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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 550.

THE WARNER VALLEY STOCK COMPANY,
APPELLANT,

vs.

HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

The Warner Valley Stock Company, appellant herein, brought its bill of complaint in the supreme court of the District of Columbia against the appellees, praying that they and each of them might be restrained and enjoined from assuming in their official capacities to exercise jurisdiction with respect to certain lands particularly described in Oregon swamp-land lists 30 and 31, and from further trespassing

upon appellant's right to the quiet possession thereof and to free the title thereto from cloud, and for such other and further relief "as the peculiar necessities and circumstances of the case may require and merit."

The defendants, appellees, demurred to the bill, thereby admitting for the purposes of the case the truth of the facts in the bill alleged (pp. 43–45), and upon the hearing it was decreed that the demurrer be sustained, the injunction prayed be denied, and the bill of complaint be dismissed with costs (p. 46). Upon appeal, the Court of Appeals of the District of Columbia affirmed the decree of the lower court (p. 59), stating, however, that it was not without some doubt that it had arrived at such conclusion (p. 57).

To review this decree an appeal to this Court was duly prayed and perfected.

The bill of complaint draws in question the validity of an authority exercised under the United States, and it appears that the lands, title to which is in dispute, were purchased by the appellant in January, 1892, for upwards of $19,000 in gold (p. 11).

PRELIMINARY STATEMENT.

Appellant's principal contention is that under the terms of the acts of Congress of September 28, 1850 (Appendix No. 1), and March 12, 1860 (Appendix No. 2), the title to all the "swamp and overflowed lands" within the State of Oregon not reserved, sold, or disposed of prior to the confirmation of title under said acts passed to and became vested in the said State, subject only to the identification by the Secretary of the Interior of the specific lands as "swamp and overflowed lands made unfit thereby for cultivation" within the meaning of said acts. Pending such identification by the Secretary the title to individual tracts of land,

claimed to be "swamp" or otherwise, was disputable. Upon such identification, evidenced by the making out of accurate lists and plats of such lands and transmitting the same to the governor of Oregon, the title became absolute in the State by relation as of March 12, 1860.

When the Secretary in due course of office and in the discharge of a *quasi* judicial function, being constituted a special tribunal for that purpose, identified specific tracts of lands within the borders of the State as of the class described and evidenced such identification as aforesaid, he became with respect thereto *functus officio* and was without jurisdiction to divest the title of the State so vested or that of its grantees, by destroying the approved lists or mutilating the official records or by entering further orders purporting to cancel and annul his prior action.

By his approval of the lists the lands became the absolute property of the State, and the title so vested could only be divested, for reasons good and sufficient in law, by judicial proceedings instituted in the proper courts.

"With the vesting of title passes away all authority or control of the executive department over the land and over the title which it has conveyed. * * * If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals, and if the Government is the party injured this is the proper course."

Moore *vs.* Robbins, 96 U. S., 530, 533.

The duty imposed upon the Secretary to cause patents for lands so identified and listed to be issued to the State upon the request of the governor therefor is but ministerial. The State's title cannot be defeated by withholding the patent, nor can anything be added to her title by issuing it.

The patents when issued do not convey the title. They operate as deeds of further assurance merely.

As a secondary consideration, it will be urged that if it were a fact that the lands in suit had been on March 12, 1860, the bed of a non-navigable lake, as was alleged, then the title thereto has vested in the State of Oregon as the riparian owner of the shore lands, and they are subject to sale by the State and not by the United States.

STATEMENT OF FACTS.

The lands in controversy, prior to December 29, 1888, had been selected by the State of Oregon as "swamp and overflowed lands" inuring to the State under the provisions of the act of March 12, 1860, and on said day lists thereof were by the United States surveyor general of Oregon certified to the Commissioner of the General Land Office (p. 4). Copies of said lists were sent by the Commissioner of the General Land Office (hereafter in this brief referred to as the Commissioner) to the United States special agent at Lakeview, Oregon, and upon the request of the governor of Oregon it was agreed that the tracts of land described in said list should be examined in the field by special agents of the United States, and their report under oath should be taken as evidence of the character thereof—that is to say, whether such lands were "swamp and overflowed" within the meaning of the granting acts hereinbefore mentioned. Such reports were not, however, to be conclusive of the claims of settlers found on any of said lands seeking title thereto under the provisions of the general land laws passed prior to March 12, 1860 (p. 5).

The lands so selected and listed, after examination in the field, were reported by the agents of the United States to be "swamp and overflowed" within the meaning of the granting act, but, as they were also found to be in the occupation of set-

tlers, the State's claim thereto was held in abeyance pending trials to determine the priority of right as between the State and the settlers, the latter alleging that the lands were at the date of the granting act (March 12, 1860) "dry lands" (p. 5).

Trials having been had, upon the testimony adduced thereat, the claim of the State to **ALL** the lands involved in this suit was sustained, **ALL** of the claims of the settlers were rejected, and final decisions in the various cases, holding that said lands on March 12, 1860, were "swamp and overflowed" within the meaning of the granting acts, and that the title thereto had passed to the State under the granting acts *supra*, were rendered by the Secretary of the Interior (pp. 5 and 6).

Thereafter the Commissioner, in due course of office, prepared clear lists of all of said lands, which lists were designated as "Oregon swamp and overflowed lands," "list No. 30" and "list No. 31," "district of Lakeview," and submitted said lists to the Secretary with a recommendation for their approval (pp. 6, 7, and 9).

On list No. 30, dated March 19, 1892, appeared the following certificate and accompanying recommendation:

"This certifies that the foregoing tracts of land, containing 1,976 51 acres, are claimed by the State of Oregon under the provisions of the act of Congress approved September 28, 1850 (9 U. S. Stat., 519), as extended to that State by the act of March 12, 1860 (12 U. S. Stat., 3); that the character of the same as swamp and overflowed lands has been established by the joint report of an agent of this office and one on the part of the State, and also by the result of hearings duly held for that purpose. Upon examination of the tract books of this office the claim of the State is found free from conflict by sale or otherwise, and under date of March 1, 1892, the register of the district land office at Lakeview reported that no claims adverse to that of the State for the tracts aforesaid appeared of record in his office.

"SAM'L W. SNOW,
"*Examining Clerk.*
"EDMOND MALLET,
"*Chief of Division.*"

"The foregoing list of swamp and overflowed lands, containing one thousand nine hundred and seventy-six and fifty-one hundredths (1,976.51) acres, is respectfully submitted to the Secretary of the Interior and the approval of the same recommended.

"THOS. H. CARTER,
"*Commissioner.*"

(pp. 22, 23.)

List No. 31 bore a similar certificate, dated November 15, 1892, and a similar recommendation, the latter being signed by "Wm. Stone, acting Commissioner."

The approval of each list by the Secretary was noted thereon (list No. 30 being approved April 9, 1892; No. 31, December 3, 1892) as follows:

"The foregoing list of swamp-land selections, containing (number of acres) acres is hereby approved, subject to any valid adverse rights that may exist to the tracts of land therein described.

"JOHN W. NOBLE, *Secretary.*"

(pp. 23–27.)

By acts of its legislature, passed in 1862 and 1870 (Deady's Code, 1872, Laws of Oregon, 629, and Oregon Session Laws, 1870, p. 54) provision was made for the disposal by the State of "swamp and overflowed" lands within its borders, and in accordance with the terms thereof the lands herein question were, with certain exceptions (p. 10), sold by the State in April, 1884, to H. C. Owens for one dollar per acre, and on January 8 and on March 23, 1883, the said excepted lands were conveyed for a like consideration to R. F. and Martin McConnaughy.

On the 15th of January, A. D. 1892, by mesne conveyances, all of said lands were demised to the plaintiff herein, the sum of four (4) dollars per acre in gold being the consideration paid therefor, and the deed of conveyance was duly recorded in the records of deeds of Lake county, Oregon (p. 11).

At the date of the purchase of the lands by plaintiff, *i. e.*, on January 15, 1892, the contests between the alleged settlers and the State had been disposed of in favor of the State and the land-office records had been cleared of their claims, and on March 19, 1892, and November 15, 1892, the claim of the State to said lands was certified to be "free from conflict by sale or otherwise" (pp. 22, 26), and on April 9, 1892, and December 3, 1892, the lists were approved by the Secretary, and such approvals were noted on the selection records and official tract books April 28, 1892, and December 9 and 20, 1892, respectively (pp. 21, 24).

December 29, 1892, after the records had been cleared of all adverse claims and the lists of lands prepared and approved and recorded as aforesaid, a petition, with exhibits, was filed IN BEHALF OF THE IDENTICAL PERSONS WHOSE CLAIMS HAD BEEN DEFEATED BY THE STATE, AS ABOVE NOTED, praying the Secretary to exercise his "supervisory jurisdiction" over the proceedings being then had in respect of these lands. Copies of said petition and exhibits were served on the governor of Oregon (pp. 28, 29), and on January 9, 1893, the Secretary referred said petition to the Commissioner for information and a report thereon and directed patents for the lands embraced in the approved lists Nos. 30 and 31 to be withheld (p. 29), notwithstanding the governor of Oregon had requested the same to be issued (p. 21).

Supplemental petitions, statements, and exhibits in behalf of the "dry-land claimants" having been filed, on consideration thereof the then Secretary (Noble) was "of opinion that all action tending to the approval or patenting of lands to said State (Oregon) embraced in the Neale survey (of the so-called Warner lake) should be further suspended," and on March 2, 1893 (p. 29), he revoked and cancelled his approval of said swamp-land lists Nos. 30 and 31 (pp. 23, 27) and directed the Commissioner to take proper steps to make said revocation and cancellation formally effective (p. 30).

Subsequently, upon consideration of *ex parte* papers,

reports, affidavits, statements, and arguments, and without the semblance of a trial in any of the forms known to judicial bodies or to the practice of the Interior Department, the defendant, Secretary Hoke Smith, proceeded, on December 19, 1893 (p. 28), to make such decisions and give such directions as appeared to him "to be lawful, right, and proper" (p. 30). After stating (p. 31) that the question before him "is whether said lands were swamp and overflowed within the meaning of the acts of September 28, 1850, and March 12, 1860" (the identical question which had already been determined in favor of the State), he concludes as follows:

"A careful review of the testimony in this case (*i. e.* the *ex parte* papers above noted) shows beyond all question that the lands involved in this controversy were once covered by a large body of water known as Lake Warner, and that at the date of the grant and of the survey all the lands embraced in lists 30 and 31 were covered by this lake, which, according to the testimony of some of the witnesses, was too deep to be forded, and that between 1874 and 1877 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry, and that the recession was quite rapid during the last two years prior to March 30, 1889.

The ruling of the Department is that the lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant (State of California, 14 L. D., 253). If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said lists are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

It seems that nearly, if not quite, all of the lands aforesaid, described by subdivisions in lists 30 and 31 and embraced in this decision, are claimed under the pre-emption, homestead, timber-culture, and desert-land laws by persons who initiated their proceedings in the year 1889; that nearly, if not quite, all of said claims have been contested by the State of Oregon or by persons alleged to be her assignees, and that many decisions have been made in favor

of such contestants. The papers before me are not sufficient to enable me to ascertain the present status of said claims and contests with precision. *I therefore direct that you cause all decisions recommending or holding for cancellation entries or declaratory statements*, upon the ground *that the lands in contest were granted to the State of Oregon as swamp and overflowed lands by the act of March* 12, 1860, *to be set aside and annulled and the cases reinstated* and all contests based upon said ground alone to be dismissed, and that you require all *bona fide* claims to such lands lawfully initiated to be prosecuted and perfected with all due diligence according to law and the rules of practice" (p. 32).

January 5, 1895, the Commissioner promulgated this decision in a letter addressed to the local land officers at Lakeview, Oregon (p. 35), from which letter it appears that under a departmental decision rendered January 17, 1887 (5 Land Decs., 369), a contract for the survey of the lands here in suit was entered into with John H. Neale, United States deputy surveyor, and that his plats of the survey thereof were approved in May and June, 1888 (pp. 17, 36); also that the filings and entries of the claimants to ALL OF SAID LANDS HAD BEEN THERETOFORE CANCELED FOR CONFLICT WITH THE CLAIM OF THE STATE (pp. 38, 39, 40), and that said filings and entries were that day (January 5, 1895) "reinstated in accordance with the departmental decisions referred to," and the local officers were directed to note such reinstatement on their office records and to "advise the parties in interest accordingly" (p. 40).

The want of jurisdiction on the part of the Secretary in this connection was urged on behalf of the grantees of the State (pp. 12, 13) without effect.

That the lands were in fact "swamp and overflowed" on March 12, 1860, and prior thereto, within the meaning of the granting acts, and, so being, were public lands subject to survey, and not "the bed of a lake," is expressly averred in the bill (p. 17), and the rapid recession of the waters referred to in departmental decision of December 19, 1893

(p. 31), is alleged and by the demurrer is admitted to have resulted from the use of draining ditches and canals constructed by appellant's predecessors in title (p. 17).

By the demurrer it is further admitted that the so-called Lake Warner, if it really covered these lands, was a non-navigable lake, and that title to the bed thereof, long prior to the alleged recession of the waters, had become vested in the State of Oregon and had by the State been sold and conveyed to appellant's remote grantors, and by mesne conveyances for value had become vested in appellant, and were consequently not subject to the control or disposal of the Land Department.

Appellant alleges that by reason of the acts of the defendants in the premises and the great faith and credit reposed by the public in the doings of such high officials the title to its lands is being clouded and the value thereof in the market greatly depreciated, and that defendants are assuming the right to dispose of said lands under the general land laws, and with respect of at least two of said tracts they have actually issued patents to other parties, and are encouraging and permitting pretended settlers to submit proofs under the general land laws for other tracts, and are threatening to approve such proofs and to issue patents to such pretended settlers for other tracts of said land, by reason whereof appellant's possession of said land and the enjoyment thereof is being interfered with by multitudes of squatters claiming said lands under color of authority from defendants, its cattle are driven astray, and the grass and other products of the lands are diverted to the use of such squatters. To redress such wrongs at law would involve a multiplicity of suits and unreasonable expenses (p. 16), and therefore—

(1) to remove cloud from its title;

(2) to restrain and prevent the defendants and either of

them from further assuming to dispose of appellant's lands and from further trespassing upon its right to the quiet possession and enjoyment thereof;

(3) to avoid a multiplicity of suits and the unreasonable expenses which would attend the same; and

(4) for general relief—

the issuance of a writ of injunction is prayed.

Defendants under their demurrer noted the following specific matters of defense:

(1) That the supreme court of the District of Columbia had no jurisdiction of the matters in controversy nor of the defendants, because it appeared "that no title, legal or equitable (to the lands in suit), has vested or been confirmed in the State of Oregon or in the plaintiff by patent of the United States or otherwise," * * * and "that the sole jurisdiction over the facts and subject-matter in the said bill of complaint alleged and set forth is by the provisions of the said acts of September 28, 1850, and March 12, 1860, vested in the Secretary of the Interior."

(2) Want of sufficient interest in the lands in controversy to enable plaintiff to maintain the action.

(3) That if plaintiff has any cause of action it is triable and determinable at law.

(4) Absence of necessary parties.

(5) Want of proper verification of the bill.

On the argument in both the trial court and the Court of Appeals all the above points except the first were expressly waived by the Assistant Attorney General representing the defendants, and, as no argument thereof was had at bar, it seems unnecessary to direct more than passing attention to them on this occasion.

Since the taking of the appeal the defendant Hoke Smith has resigned as Secretary of the Interior and his successor in office has been appointed. As to him it seems clear that the case has abated.

U. S. *ex rel.* Lewis *vs.* Boutwell, 17 Wall., 604.

But as the defendant Commissioner Lamoreux is threatening to carry the mandate of Secretary Smith into execution, the relief prayed in the bill will be fully met by enjoining him from so doing. So much of the prayer for relief as asks that the defendant Smith may be required to prepare patents for issuance to the plaintiff must go for naught, but inasmuch as the entire future conduct of the Land Department with reference to these lands has been remitted to Commissioner Lamoreux, the matters here and now in issue can be effectively tested and a decree awarding the injunction as prayed will afford the plaintiff complete relief.

ARGUMENT.

The supreme court of the District of Columbia has the power to enjoin the head of an Executive department in a proper case.

Whatever doubt may have existed in reference to this proposition has been removed by the decision of this Court in the case of Noble, Secretary, &c., *vs.* Union River Logging Railroad Company (147 U. S., 165), wherein it was held—

"That there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts.

* * * * * *

"We have no doubt that the principle of these decisions (cited in the text) applies to a case wherein it is contended that the act of a head of a department, under any view that could be taken of the facts before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in Louisiana Board of Liquidation *vs.* McComb, 92 U. S., 531, 541: 'But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other" (p. 172).

The acts of September 28, 1850, and March 12, 1860, constitute grants *in presenti* of all lands answering the description of "swamp" lands, and are sufficient of themselves to pass the title. If the lands be really swamp and overflowed, the title thereto, by virtue of the acts, vests in the State, subject only to the determination of the *fact*, by whatever method may be selected. The listing of the lands by the Secretary has been held to be a sufficient identification. It cannot be that executive officers charged with no higher duty than that of identifying the subject of the grant can, by refusing to identify such subject or withholding the evidence of such identification, defeat the grant itself.

Where lands are granted by legislative enactment, and the grantee is authorized to demand a patent therefor, the grantee's title is as completely vested as though the patent, which is but *evidence* of the title, had been issued.

The office of the patent is but to make more definite the boundaries of the already identified lands.

When, therefore, as in the case at bar, the lands have been formally identified and listed as "swamp lands" by the Secretary, and the lists have been duly certified to the governor of the State, and the governor has requested the issuance of patents therefor, the title to said lands so identified and listed by virtue of the acts aforesaid has vested absolutely in said State, and the Secretary is without power to defeat the grant or detract from the title by withholding the patents. The title to the lands having passed out of the United States, they are no longer subject to the disposal of the Secretary, and any act of his looking to the further disposal thereof, upon any right view of the facts, would be *ultra vires* and beyond the scope of his authority.

Any further power that may remain in him on behalf of the grantor or grantee is purely ministerial in character. To issue patents conforming to the approved lists at the request of the governor is a plain official duty, requiring the exercise of no discretion. Were it desired, a *mandamus* would

doubtless lie to compel its performance. This plain official duty being threatened with violence by positive official acts, the plaintiff, who will thereby suffer irremediable injury is entitled to an injunction to prevent such acts.

FIRST.

The acts of September 28, 1850, and March 12, 1860, operated as a grant in presenti to the State of Oregon of particular lands having a described quality, to be thereafter identified, the Secretary of the Interior being constituted by the terms of the acts a special tribunal for the purpose of identifying the same. Upon identification of the lands granted, the title thereto became vested in the State. The patent when issued would operate merely as record evidence of the title. It could add nothing to the title itself.

The words of the granting act are "the whole of those swamp and overflowed lands made unfit thereby for cultivation * * * be, and the same are hereby, granted" * * *

The act itself operates to convey a present interest to the grantee State in all lands of the specified class. Upon identification of particular tracts the grant attached thereto, and when such tracts were once identified the legal title related back to the date of the grant and became perfect as of that date, as if the identified tracts had been described in the act itself.

Such has been the uniform construction of the Act by the Interior Department from 1850 to recent times.

January 15, 1856, Secretary McClelland wrote to the Commissioner of the General Land Office (1 Lester's Land Laws, p. 555):

"The land in question has been selected as swamp land under the act of September 28, 1850, and, if really swamp

land, was granted to the State of Louisiana by said act, and the selection as internal-improvement land subsequent to the date of that law could not affect the validity of the swamp selection."

December 29, 1857 (1 Lester's Land Laws, p. 557), Secretary Thompson construed the law as follows:

"In my opinion, the approval and certification of my predecessor are the completion of a duty in regard to swamp and overflowed lands imposed upon the Secretary of the Interior by said act of September 28, 1850, *and his act cannot now properly be reviewed or recalled.* The State authorities have a right to call for a patent or patents, pursuant to certified lists, unless fraud or mistake has been discovered." * * *

"When a tract has been selected, and has been approved and certified as a swamp tract, * * * the fact of the land being of a swampy description must be regarded by us as affirmatively determined, and not to be drawn in question or subject to a different adjudication."

October 24, 1858 (1 Lester L. L., p. 562), the same Secretary wrote to the Commissioner as follows:

"In your instructions to the surveyor general I do not observe that any distinction has been made between those tracts the selection of which as swamp lands has been approved and certified to the governor of the State under the act of Congress of September 28, 1850, and those tracts which have been selected and reported, but not finally certified to the governor, as inuring to the State under the swamp-land grant. On consideration of this branch of the case now before me, on the appeal of E. H. Porter for himself and others, who claim that a patent shall issue to the State for said lands, under the swamp-land grant, I am of the opinion that the question of the swampy character of such tracts as have been carried into approved lists, and certified to the governor of the State as such, has already been determined affirmatively, so far as the action of this department is concerned, and contests on that point can no longer be properly entertained. * * * When selections under the act of September 28, 1850, have been approved and cer-

tified, the duty of designating the granted lands imposed by the law on this department has been discharged, the acts done cannot be recalled or annulled, and the State has a right to demand a patent for the tracts of land embraced in any certified list that has been delivered to the governor. To a demand therefor this department responds by issuing a patent pursuant to such certified list. * * * It is believed that the uniform course of the decisions of this department since my attention has been called to these questions has been consistent with the views now expressed."

April 19, 1877 (Copp's Land Laws, vol. 2, p. 1048), Secretary Schurz declared that—

"The legal character of this grant has often been passed upon by the Court, and it has been uniformly held that the act was a present grant, vesting in the State *proprio vigore* from the day of its date title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect."

February 25, 1886 (4 Land Decisions, 415), Secretary Lamar said:

"The principle has been formerly established by the decisions of the courts and of this department that the grant of swamp lands made to the several States was a grant *in præsenti*, and conferred a vested right to such lands as of the date of the grant, and that the field-notes of survey may be taken as a basis in determining the character of the land if the State so elects."

August 7, 1886 (5 L. D., 31, 33), the same Secretary wrote to Commissioner Sparks:

"The question as to the character of these lands has been fully adjudicated upon the report of the special commission (one agent of the United States and one of the State) appointed for that purpose. As to the lands reported as not swamp and overflowed, it has been decided by the department that the State is estopped from further examination of said lands and cannot now be heard to show that such

lands are swamp and overflowed, and that the Government and all other parties are equally estopped from investigation of the character of the lands reported by said commission as swamp and overflowed and which have been approved and certified as lands inuring to the State under the swamp-land grant, unless fraud or mistake be shown (citing Secretary Thompson, *supra*). *This has been the uniform ruling of the department.* Therefore an application for (to) contest which merely alleges that lands certified and approved by the Secretary of the Interior as swamp and overflowed are not such in fact, but dry and fit for cultivation without artificial drainage, should not be received, and no hearing should be ordered thereon, although the land in fact may be of the character described in the affidavit."

December 22, 1886 (5 L. D., 300), however, Acting Secretary Muldrow ruled that "the Government would not be concluded if it was shown that the certification and approval of said list was obtained *by fraud or mistake*," and intimated that it would be proper under certain circumstances to call upon the grantee State to show cause why the approval and certification of selections embraced in "list No. 5" should not be revoked and canceled.

This ruling was a departure from precedent. It marked the beginning of a novel construction of the granting acts, which has since run riot in the Department, and resulted in the extreme doctrine announced June 1, 1891 (12 L. D., 565, 566), by Acting Secretary Chandler, to the effect that the Department of the Interior retains control of all swamp-land selection lists after certification and approval and "until after the issuance of patent," and may revoke the approval and certification of such lists when they have been made under a misapprehension of facts.

It is interesting to note that between December, 1886, and June, 1891, within a period of less than five years, the uniform contemporaneous construction of these acts, which had prevailed from 1850 to the former date, was entirely uprooted; but scant consideration seems to have been given

by the latter-day officials to the prior unbroken line of decisions. The established construction was overruled apparently without cogent reasons to support its reversal (U. S. *vs.* Moore, 95 U. S., 760), and confusion worse confounded has resulted.

Aside from the apostatic rulings of the Interior Department between December, 1886, and June, 1891, the contemporaneous and long subsisting construction of the statutes as first above noted has prevailed in the Departments as well as in the State and Federal courts.

November 10, 1858 (9 Opinions Att'y Gen'l; 1 Lester's L. L., p. 564), Mr. Attorney General Black advised Secretary Thompson as follows:

"By the act of September 28, 1850, Congress granted to the State of Arkansas all the swamp and overflowed lands rendered unfit for cultivation thereby within her limits. * * * On the 9th of February, 1853, Congress made another grant to the States of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the State of Arkansas under the denomination of swamp lands was included and is now claimed for the use of the railroad. The question upon which you ask my advice requires a comparison of the two laws and the acts done under them so as to ascertain which of these is the better title. Does the State take it under the first grant, or was that grant so imperfect that the subsequent disposition of it by Congress passes the right to the later grantee? Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail, *prior in tempore potior est in jure.*

"This difficulty therefore is solved if the mere grant, as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt.

* * * "It is not necessary that the patent should issue before the title vests in the State under the act of 1850. The act of Congress was a present grant, wanting nothing but a definition of boundaries to make it perfect, and to *attain that object* the Secretary of the Interior was directed to make out

an accurate list and plat of the lands and cause a patent to be issued therefor; but when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title.

"The authority given to the State legislature to dispose of the lands upon the patent does not make the grantee less the exclusive owner of them than she would be if those words were omitted. The object of that clause undoubtedly was to prevent the legislature of the State from a premature interference with the lands before they were so designated as to preclude mistake and confusion."

STATE COURTS.

"That the grant vested the State with the title to such lands as were within the purview of the granting act is so well established on authority that only a reference to the fact is required. It has been held that the act by its own force operated to pass the title at once."

Allison *vs.* Halfacre, 11 Iowa, 450.
Fremont and Mills Counties *vs.* Bur. & Mo. R. R. Co., 22 Iowa, 91, 93.
Courtright *vs.* C. R. & M. R. R. Co., 35 Iowa, 386.
Railroad Co. *vs.* Brown, 40 Iowa, 333.
Hays *vs.* McCormick, 83 Iowa, 89, 92.
American Em. Co. *vs.* Fuller, 83 Iowa, 599, 609.
Bailey *vs.* Callanan, 87 Iowa, 107.
Fore *vs.* Williams, 35 Miss., 533.
Funston *vs.* Metcalf, 40 Miss., 504.
Daniel *vs.* Purvis, 50 Miss., 261.
Fletcher *vs.* Pool, 20 Ark., 100.
Branch *vs.* Mitchell, 24 Ark., 431, 444.
Hendry *vs.* Willis, 33 Ark., 833, 837.
Owens *vs.* Jackson, 9 Cala., 322.
Kernan *vs.* Griffith, 27 Cala., 87.
Tubbs *vs.* Wilhoit, 73 Cala., 61.
McCabe *vs.* Goodwin, 106 Cala., 486.
Whiteside County *vs.* State's Att'y, 31 Ills., 68.
Thompson *vs.* Prince, 67 Ills., 281.
Keller *vs.* Brickey, 78 Ills., 133.
County of Piatt *vs.* Grumley, 81 Ills., 350.
Bristol *vs.* Carroll County, 95 Ills., 84.

Edmonston *vs.* Corn *et al.*, 62 Ind., 17.
State *vs.* Portsmouth Savings Bank, 106 Ind., 435.
Hannibal *vs.* St. Joseph R. R. Co. *vs.* Smith, 41 Missouri, 310.
Masterson *vs.* Marshall, 65 Missouri, 94, 100.
Jasper Co. *vs.* Wadlow, 82 Missouri, 173.
Busch *vs.* Donohue, 31 Mich., 481.
Gaston *vs.* Stott, 5 Oregon, 48, 61.

The granting act itself, without patent, conveyance, or formal assurance, passed the title to the grantee.

Courtright *vs.* C. R. & M. R. R. Co., 35 Iowa, 386.
American Em. Co. *vs.* Fuller, 83 Iowa, 609.

"The act of Congress describes the lands, not by specific boundaries, but by its quality, and is a present legislative grant of all public lands within the State of the quality mentioned. The patent is matter of evidence and of description by metes and bounds. The office of patent is but to make the description of the land definite and conclusive as between the United States and the State."

Owens *vs.* Jackson, 9 Cala., 322.

"The act of September 28, 1850, granting to California the swamp and overflowed lands within the State vested in said State the absolute ownership of all of said lands then undisposed of, and the title of the State in no way depends upon the issuance of a patent to the State by the United States. The State of California since the 28th day of September, 1850, has had the absolute power of selling the swamp and overflowed lands within its limits."

Kernan *vs.* Griffith, 27 Cala., 86.
Tubbs *vs.* Wilhoit, 73 Cala., 61 (138 U. S., 134).

"While a patent issued therefor or any equivalent determination by the Land Department of the character of the lands would have the effect to estop the United States from afterwards questioning their character, it does not confer any additional title upon the State."

McCabe *vs.* Goodwin, 106 Cal., 486.
Keller *vs.* Brickey, 78 Ills., 133.

In the case of State *vs.* Portsmouth Savings Bank (106 Ind., 435) the supreme court of Indiana, after a thorough examination and discussion of the granting act and the various State and Federal decisions construing the same, came to the following conclusions:

"1st. The swamp-land act of 1850 *ex proprio vigore* was a grant *in presenti* to the State of all the swamp lands therein situated. * * *

"2d. Whether or not any particular tract of land was or is swamp lands within the terms of the grant was and is a question for the decision of the Secretary of the Interior.

"3d. His decision upon that question when one (is) made is final and conclusive and cannot be questioned or overthrown by parole evidence.

"4th. It is not necessary that the decision of the Secretary that any particular tracts of lands were or are swamp lands should be evidenced by a patent to the State. It is sufficient that the lands have been selected as such and the selection approved by that officer.

"5th. When such selection has been approved by that officer and the particular tracts of land thus identified as swamp lands the title relates to the date of the grant, namely, September 28, 1850.

"6th. A patent to the State for swamp lands issued by the Secretary of the Interior is evidence that the designated tracts were properly selected as swamp lands and fixes the title thereto as of the date of the swamp-land act, namely, September 28, 1850, &c. The grant carried to the State the bed of the lake."

Where an act of Congress makes, in express terms, a grant of specific lands belonging to the United States no patent or other assurance is necessary to pass the fee to the grantee, but if anything remains to be done by the grantor or grantee to consummate the grant after the passage of the law it will not take effect and vest the title until such act has been performed.

Thompson *vs.* Prince, 67 Ill., 281.

Where the list of swamp and overflowed lands was selected and approved by the Secretary of the Interior the title was by the act of Congress vested in the State.

County of Piatt *vs.* Grumley, 81 Ill., 350.

"It is well settled that the act of September 28, 1850, made a grant to the State *in presenti* of all lands coming within the description. When they are properly designated and ascertained the grant relates to the date of the act.

* * * "It is enough to say that if the lands be really swamp and overflowed the right vests in the State by the act, and when the *fact* is determined, by whatever method, this right has relation to the date of the passage of the act."

Hendy *vs.* Willis, 33 Ark., 837.

"That the act was a present grant vesting in the State, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubts can be entertained. The object of the second section was not to postpone the vestiture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries and to prevent a premature interference with the lands by the State legislature before they were so designated, so as to avoid mistake and confusion."

Fletcher *vs.* Pool, 20 Ark., 100.

In Branch *vs.* Mitchell (24 Ark., 431, 444) the court affirmed its former rulings and decided that the provisions for listing and patenting—

"Can no more be held to limit the effect of the present grant in the first section than if in a deed, after the immediate and express conveyance of the lands by some general description, it should be provided that when the numbers should be ascertained another deed should be made on 'which the fee-simple should vest.' This would make the title to the State to any of the land depend on the request of the governor for a patent. The words of the second sec-

tion must be held to be simply a definition of the *nature* of the title which the State took under the grant and not a postponement of the period at which the title should vest."

In Busch *vs.* Donohue (31 Mich., 481), which was a case of land approved by the Secretary as "swamp" but *not patented*, it was held:

"A subsequent patent might be convenient as an evidence of title, but it would not be necessary, for the act itself, when the lands were properly identified, was as effectual to transfer the title as any instrument it was in the power of the Government to give."

The supreme court of Missouri in Masterson *vs.* Mitchell (65 Mo., 94, 100) said:

"Lists of such lands (swamp) selected by the State authority, when approved by the Secretary of the Interior and reported to and accepted by the governor, are clearly sufficient to complete the grant and vest the title. Such lists were made in the present case, and the title to the lands in controversy was therefore vested in the State at the time of the location and settlement made by the plaintiff in 1856, although no patent had then issued to the State, and such lands were no longer subject to sale by the United States authorities, and it was beyond the power of Congress to divest such title by legislative enactment without the consent of the State."

Nowhere, however, in the State reports will there be found a more extended or able discussion of the whole matter, including the right of the States to deal with "swamp lands" *prior* to their identification by the Secretary, than in the case of Gaston *vs.* Stott, 5 Oregon, 48, 61.

SUPREME COURT OF THE UNITED STATES.

The act of September 28, 1850 (9 Stats., 49, c. 484), first came before this Court for construction in the case of Hannibal and St. J. R. R. Co. *vs.* Smith, 9 Wall., 95–102.

The action was in ejectment against the defendant Smith to obtain possession of certain lands occupied by him as grantee of the State of Missouri. The railroad company claimed the right of possession under a grant of June 10, 1852, from the United States to the State of Missouri for railroad purposes. The lands had been conveyed to Smith by the State as "swamp lands," which had inured to it under the grant of September 28, 1850.

The particular lands had not been identified by the Secretary as "swamp," nor had they been listed or patented to the State as such. Counsel for defendant Smith conceded that title to the land had vested in the railroad company, unless they were "reserved" from the operations of that grant, because the title thereto had already passed to the State under the "swamp" grant of 1850.

The Secretary having neglected to determine the true character of the lands, as he was in duty bound to do, on the trial the court permitted Smith to introduce oral testimony tending to prove the character of the lands at the date of the granting act. This action was assigned for error, and upon review here was declared to have been proper.

The Court, through Mr. Justice Miller, said:

"Congress has here (in the statute) given a criterion—apparently not difficult of application—by which to determine what was granted, to wit, such legal subdivisions of the public lands the greater part of which were so far swamp and overflowed as to be too wet for cultivation. Now, here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their town-

ships, ranges, and sections to identify them as coming within it. In this respect it is precisely like the railroad grants, which only become certain by the location of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in the future. No act of Congress has ever attempted to take back this grant of the swamp lands. * * * It was protected by positive reservations in the grant under which the plaintiff (railroad company) claims. * * *

"By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact (whether swamp and overflowed or not) and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay."

This decision was shortly followed by an opinion in the case of French *vs.* Fyan, 3 Otto, 169, which case was in many respects the correlative of the former case. French, claiming the right of possession in certain lands by purchase from the Missouri Pacific Railroad Company, the lands having been certified by the Secretary to the railroad company as inuring to it under the grant of June 10, 1852, brought his action in ejectment against Fyan, who was in possession as grantee of the State under a swamp-land patent issued in 1857 to Missouri.

Plaintiff offered to prove that the lands were not and since 1849 had not been "swamp and overflowed." The court declined to admit the testimony, and plaintiff excepted.

This Court again, speaking through Mr. Justice Miller, said:

"The single question in this case is raised on the refusal of the court to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question under the act of 1850, known as the swamp-land grant, the purpose being to show by such testimony that it was not in point of fact swamp land within the meaning of the act. * * *

"This court has decided more than once that the swamp-land act was a grant *in præsenti*, by which the title to those passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, *which is the evidence that the lands contained in it had been identified as swamp lands under that act*, relates back and gives certainty to the title (as) of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State under the act of 1850; for while the title under the swamp-land act, being a present grant, takes effect as of the date of that act * * * there can be no claim of an earlier date than that of the act of 1852, two days later, for the inception of the title of the railroad company.

"The only question that remains to be considered is, whether in an action at law in which these evidences of title come in conflict parol testimony can be received to show that the land in controversy was never swamp land, and therefore the patent issued to the State under that act was void.

"The second section of the swamp-land act declares 'that it shall be the duty of the Secretary of the Interior, as soon as practicable after the passage of this act, to make out an accurate list and plats of the land described as aforesaid, and transmit the same to the governor of the State, and at the request of the governor cause a patent to be issued to the State therefor, and on that patent the fee-simple to said lands shall vest in said State, subject to the disposal of the legislature thereof.' It was under the power conferred by this section that the patent was issued under which defend-

ant holds the land. We are of opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty and conferred upon him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

Because of the great delays in adjusting the swamp-land grants encountered in the Interior Department, the Congress, on July 23, 1866 (14 Stats., 219, 220), passed "An act to quiet land titles in California," which, because of the terms in which it is couched and the construction placed thereon by this Court in cases hereinafter cited, it seems well to notice at this point. In order that the points of similarity between said act and the granting act of September 28, 1850, may be shown, we have arranged the important extracts from the two acts in parallel columns. The full text of both acts, so far as applicable here, will be found in the APPENDIX to this brief.

ACT OF SEPTEMBER 28, 1850.	ACT OF JULY 23, 1866.
That to enable the State of Arkansas to construct the necessary levees * * * the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.	That in all cases where township surveys have been or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The Commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and ap-
SEC. 2. That it shall be the duty of the Secretary of the Interior * * * to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor. * * *	

prove township plats accordingly, and forward to the General Land Office for approval: *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

"SEC. 5. *And be it further enacted*, That it shall be the duty of the Commissioner of the General Land Office to instruct the officers of the local land offices and the surveyor general, immediately after the passage of this act, to forward * * * lists and maps of all swamp and overflowed lands claimed by said State, or surveyed as provided in this act, for final disposition and determination, which final disposition shall be made by the Commissioner of the General Land Office without delay." * * *

"SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands known and designated as aforesaid, may be situated."

Wright *vs.* Roseberry, 121 U. S., 488, was a case arising under the act of July 23, 1866, and Revised Statutes of the United States, 2488 (Appendix No. 4), but its consideration necessitated an exhaustive discussion of the terms of the act of September 28, 1850.

The action was to recover possession of a tract of land in California. The tract was alleged to be "swamp and overflowed land" granted to the State by act of September 28, 1850. The action was twice tried in the State district court and, by stipulation of parties, without a jury.

At both trials plaintiff asserted title to the premises as "swamp and overflowed lands" by conveyance from parties who were grantees of the State. The defendants claimed under patents of the United States issued to them or their grantors under the pre-emption laws.

On the first trial the court found 160 acres of the tract to be swamp and overflowed within the meaning of act of 1850 and gave plaintiff judgment for possession thereof, but made no finding as to remainder of lands. For this failure the judgment was reversed by the State supreme court and a new trial ordered. On the second trial further testimony was introduced, and the district court set aside its previous findings and gave judgment on all issues for the defendants. This judgment was affirmed by the supreme court of the State.

On writ of error this Court, through Mr. Justice Field, said:

"It does not distinctly appear what caused the district court to change its first decision with respect to those lands, which it had originally held to be swamp and overflowed, but, as it admitted in evidence the patents of the United States and held that they passed the title to the defendants, it had probably reached the conclusion, which the supreme court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the State, pursuant to the fourth section of the act of Congress of July

23, 1866, 'To quiet land titles in California' (*supra*, and Appendix No. 3). For want of such certificate the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. To determine its correctness it will be necessary to consider the nature of the grant to the State of swamp and overflowed lands, the proceedings taken under the laws of the State and of the United States to ascertain and define their boundaries, and the effect of the act of July 23, 1866, and of section 2488, Revised Statutes United States, as *confirmatory* of previous segregations by the State.

"Soon after the passage of this act (September 28, 1850), the question arose as to the time the grant took effect, whether at the date of the act or on the issue of the patent to the State upon the request of the governor, after the lists and plats of the lands were made out by the Secretary of the Interior and transmitted to him. * * *

"The language of the first section of the act indicates a grant *in præsenti* to each State of lands within its limits of the character described. Its words, 'shall be and are hereby granted,' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended that these sections postponded the vesting of title in the State until the lands granted were identified and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regarded as simply providing the mode of identifying the lands and furnishing documentary evidence of their identification, and not as a limitation upon vesting the right to them in the State, as this would make the investiture dependent upon the request of the governor and not upon the act of Congress. * * * The question thus brought to the attention of the department under whose supervision the act was to be carried into

effect was one upon which men might very well differ; but after its solution had been reached and the conclusion was acted upon, necessarily affecting title to immense tracts of land, there should be the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned.

"There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; yet it has been held that the patent in such cases operated merely as record evidence of the title and added nothing to the title itself."

Langdeau *vs.* Haynes, 21 Wall., 521.
L. L. & G. R. R. Co. *vs.* United States, 92 U. S., 733.
R. R. Co. *vs.* Baldwin, 103 U. S., 426.
Missouri, K. and T. R'y Co. *vs.* K. P. R'y Co., 97 U. S., 491.
Schulenberg *vs.* Harriman, 21 Wall., 44, 60.

"It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. * * * The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor; but the right of the State under the first section would not be enlarged by the action of the Secretary except as to land (not swamp or overflowed) contained in a legal subdivision, as mentioned in the fourth section, nor could it be defeated in regard to the swamp and overflowed lands by his refusal to have the required list made out or the patent issued, notwithstanding the delays and embarrassments which might ensue.

"The conclusion which the Land Department reached,

upon its examination of the character of the grant soon after the passage of the act, was that the title passed to the State at the date of the act."

After citing many decisions of the Land Department officials, of the supreme courts of various States, and of the Supreme Court of the United States, the learned justice continues as follows:

"The result of these decisions is that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but when that officer has neglected or failed to make the identification it is competent for the grantees of the State to prevent their rights from being defeated to identify the lands in any appropriate mode which will effect that object" (p. 509).

"The legislation of Congress subsequent to the act of 1850, for the purpose of giving it effect, has been in consonance with the view stated of the nature of the grant. It has uniformly recognized the paramount character of the State's title, and has endeavored to correct the evils which in many cases followed from the delay of the Secretary of the Interior in identifying the lands and furnishing to the State the required lists and plats. The legislatures of the several States in which such lands existed very generally themselves undertook to identify the lands and to dispose of them, and for that purpose passed appropriate legislation for their survey and sale and the issue of patents to the purchasers.

"The act of Congress of March 12, 1860 (12 Stats., 3, c. 5), extending the provisions of the swamp-land act to Minnesota and Oregon, recognizes in its second section their right and that of other States to make selections of the swamp lands, or rather to provide for their identification without waiting for the action of the Secretary of the Interior.

"By an act passed on the 23d of July, 1866, entitled 'An act to quiet land titles in California' (Appendix No. 3) Congress changed the provisions of law for the identification of swamp and overflowed lands in that State. * * *

"As early as 1855 the legislature of California undertook to control and dispose of those lands.

"The question, therefore, is whether * * * the plaintiff can maintain an action for the recovery of the lands, *they never having been certified over to the State as required by section 2488 of the Revised Statutes* (Appendix No. 4) *or patented to her under the act of 1850.* According to the decisions we have cited, the holders of the certificates of purchase had a good title to the lands if, in fact, they were swamp and overflowed lands on the 28th day of September, 1850.

"The court below held and placed its decision upon the ground that because the Commissioner of the General Land Office had not certified the lands in controversy to the State as swamp and overflowed when this action was commenced, in 1870, there was no title in the State by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the Commissioner instead of the act of Congress, whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of the segregation. The decision is in conflict with its previous decisions and with the adjudged cases to which our attention has been called. * * * For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day when the swamp-land act of 1850 took effect."

Irwin *vs.* San Francisco Savings Union *et al.*, 136 U. S., 578, was an action of ejectment by the Savings Union against Irwin.

The plaintiff claimed the lands under a patent from the State of California, issued to him in 1874 for "swamp" lands, but the lands had not been listed or patented to the State. Defendant claimed to be in possession as an officer of and in behalf of the United States.

Field, circuit justice, with whom concurred Sawyer, circuit judge, held that—

"Lands may be proved to come within the swamp-land grant of September 28, 1850, by oral testimony, when not listed nor patented to the State by the Secretary of the Interior.

"The title to such swamp and overflowed lands passed by said act to the State, although they have not listed nor patented."

On writ of error, Mr. Assistant Attorney General Maury conceded that the conclusions reached by the trial court were sustained by Wright *vs.* Roseberry, *supra*, and thereupon, on authority of that case, the judgment was affirmed.

One Silas Tubbs, asserting title to the demanded premises under a homestead patent issued to him by the United States, brought his action against defendant, Joseph Kile, who claiming as grantee of the State of California, alleged that the title to said lands had vested in the State under the terms of the acts of September 28, 1850, and July 23, 1866. It was sought to defeat Kile's claim of title upon the ground that it appeared that the plats of the township survey encompassing the land had not been approved, nor had the land been certified to the State by the Commissioner of the General Land Office "as swamp and overflowed."

The issues were tried by stipulation of parties without the intervention of a jury, and upon special findings of fact judgment was rendered for the plaintiff. On appeal to the supreme court of the State judgment was reversed and a new judgment ordered in favor of Kile's executors for the lands and for the rents and profits thereof. On writ of error from this Court the latter judgment was affirmed, the Court saying that it sufficiently appeared that the township plat had been approved, and that—

"The duty of the Commissioner to certify over to the State the lands represented thereon as swamp and over-

flowed was purely ministerial. He could not defeat the title to the State by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the State by its additional recognition of the land as that covered by the Congressional grant of 1850. It would not have added to the completeness of the title. A strange thing it would be if the refusal of an officer of the Government to discharge a ministerial duty could defeat a title granted by an act of Congress and enable him to transfer it to parties not within the contemplation of the Government."

Tubbs *vs.* Wilhoit, 138 U. S., 146.

It is not perceived that the discussion in Chandler *vs.* C. & H. Mining Co., 149 U. S., 79, &c.; McCormick *vs.* Hayes, 159 U. S., 332, or Locomotive Machine Works *vs.* American Emigrant Co., 163 U. S., —, in anywise modifies the principles of the foregoing cases, although it is noticed that in those cases some emphasis is laid upon the clause of the granting act to the effect that "on that patent the fee-simple to said lands shall vest in the said State."

In Butterworth *vs.* Hoe, 112 U. S., 68, it was held that when the Commissioner of Patents had fully exercised his judgment and discretion in deciding that a person was entitled to a patent, the remaining duty, to prepare it and lay it before the Secretary for his signature and to countersign it, was all that remained, and they were purely ministerial.

The argument that the legal title to particular tracts of "swamp" lands vested in the State upon the approval by the Secretary of the selection lists is further supported by the leading case of The United States *vs.* Schurz, 102 U. S., 378. In that case one McBride had made a homestead entry of the lands in controversy, and in due course of law submitted his final proof, which was accepted. A patent for

the lands running to himself as grantee was prepared, signed, sealed, duly recorded in the proper record book, and transmitted to the local officers at Salt Lake City for delivery. Prior to its delivery, however, it was brought to the attention of the Secretary that before said patent had been prepared there was pending in the Land Office the application of the corporate authorities of Grantsville praying the cancellation of McBride's entry and the patenting of the land to themselves, under their earlier application therefor, as town-site claimants. Thereupon the Secretary recalled the patent and directed it to be cancelled. The relator having demanded delivery of the patent, and it being refused, he applied to the supreme court of the District of Columbia to aid him by a mandamus. The Secretary in his answer set forth that at the date of McBride's entry the lands were within the corporate limits of the city of Grantsville and hence not subject to homestead entry under the public-land laws; that the patent in question had been improvidently prepared and transmitted to the local office, and upon discovery of that fact it had been recalled and regularly cancelled.

After determining the matter of jurisdiction in favor of the relator this Court overruled the objection to the effect that the issuance and delivery of a patent involved the exercise of judgment and discretion and was an act not merely ministerial, but rather judicial, in character, and proceeded to discuss the point principally interesting here, viz.—

" that the relator was not entitled to the land by the laws of the United States because it was not subject to homestead entry, and that the patent is therefore void."

Upon this point the Court, speaking by Mr. Justice Miller, said (pp. 401–403):

" We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction, on which valuable rights often depend, and the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry, and sale. The question whether any particular tract belonging to the Government was open to sale, pre-emption, or homestead right is in every instance a question of law, as applied to the facts, for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made (and recorded in the shape of the patent), how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

"The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside

or correct it if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and for what price it should be sold, and when in accordance with their decision it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

"From the very nature of the functions performed by these officers and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee any more than the burning up of a man's title deeds destroys his title."

The identification of the lands as "swamp and overflowed" by approving the lists and making plats thereof and forwarding the same to the governor of Oregon was the last act in the series necessary to perfect and vest the legal title in the State.

All that remained to be done thereafter was purely ministerial. The approval and transmission of the lists and plats closed the proceedings, so far as the vesting of title was concerned, as fully as if patents had actually issued.

United States *vs.* Arredondo, 6 Pet., 729, 730;
United States *vs.* Stone, 2 Wall., 535;
United States *vs.* Throckmorton, 98 U. S., 61;
Vance *vs.* Burbank, 101 U. S., 519;
French *vs.* Fyan, 93 U. S., 171;
Tubbs *vs.* Wilhoit, 138 U. S., 146;
United States *vs.* Schurz, 102 U. S., 401, 402; and
Butterworth *vs.* Hoe, 112 U. S., 68.

From the foregoing citations, then, it distinctly appears that the grant of "swamp" lands to the various States is a grant *in presenti* passing title to the respective States as of the date of the granting act, subject only to the identification of particular lands possessing the described quality. For the purposes of such identification, the Secretary of the Interior, by the granting act, is constituted and appointed a special tribunal. When acting as such special tribunal in ordinary course he has designedly identified particular tracts as being of the described class and has evidenced such identification by making out accurate lists and plats thereof and transmitting them to the governor of the State, he becomes *functus officio* with reference to all lands so listed and platted, and the title to such listed lands passes to the State, although they may in fact be "dry" lands. If fraud or mistake of fact has induced the "identification," the regularly constituted judicial tribunals of the country alone can afford relief.

When a matter has once been heard and determined by a special tribunal it cannot be recalled, reviewed, or further considered. The tribunal is *functus officio*.

People *ex rel.* Thomson *vs.* Supervisors of Schenectady, 35 Barb. (N. Y.), 408.

The Secretary cannot divert the title of "swamp" lands by arbitrarily withholding the patents or withdrawing his approval. His action in identifying the lands and approving the lists was not void; it was at most but voidable, for he was possessed of jurisdiction to act upon the facts presented to him, and the lands were subject to his disposal.

Noble, Sec'y, *vs.* Union River Logging R. R. Co., 147 U. S., 165.

Moffat *vs.* United States, 112 U. S., 24.

United States *vs.* Minor, 114 U. S., 233.

Moore *vs.* Robbins, 96 U. S., 530.

In the last case this Court said:

"With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can of his own volition recall or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong have been done, the courts of justice present the only remedy.

"The functions of that department necessarily cease when the title has passed from the Government. * * * It is a matter of course that after this is done neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being safe and assured evidence of ownership, as they are generally supposed to be, would be always subject to the fluctuating and, in many cases, unreliable action of the Land Department.

"If such a power exists, when does it cease? There is no statute of limitations against the Government, and if this right to reconsider and to annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is found."

"If," says Freeman in his work on Judgments, section 69, "a vacillating, irresolute judge were allowed to thus keep cases ever within his power, to determine and redetermine them term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and capriciously as a chameleon changes his hues, then litigation might become more intolerable than the wrongs it was intended to relieve."

In arriving at the decision in this case the Court of Appeals appears to have been misled in at least two particulars, one of fact, the other of law.

As to the former the Court seems to have found that at the date of the approval of these lists adverse claims had attached to the lands in controversy and were pending in the department. There is no foundation in the record for such finding. It is directly negatived by the pleadings, and an inspection of Exhibit " E " (p. 35), promulgating the Secretary's decision of December 19, 1893 (Exhibit " C," p. 28), shows beyond a doubt that each adverse claim to any of said lands had, prior to the dates of approving the lists, and as the results of contests regularly prosecuted, been expunged from the records. If the recital in said decision of December 19, 1893, to the effect that "upon information furnished by the land office that adverse claims to tracts involved in said lists were then pending in that office and had not been disposed of" had any foundation in fact, it referred to other lands than those involved in this suit.

As to the error of law, both the trial court and the appellate tribunal were led astray by the misapplication of some general expressions found in the cases of Knight *vs.* Land Association, 142 U. S., 166, 178, and New Orleans *vs.* Payne, 147 U. S., 261; and also by the theory, erroneous as we have above shown, that the final act in the series necessary to vest title was the issuance of the patent.

Knight *vs.* U. S. Land Association (142 U. S., 178) was an action of ejectment brought by the Association, asserting that the demanded premises were below the line of ordinary high-water mark, and inured to the State of California upon its admission into the Union by virtue of its sovereignty over tide lands. The defendant, Knight, insisted that the lands were a portion of the pueblo of San Francisco, as confirmed and patented by the United States. The case turned upon the validity of conflicting surveys made under the direction of the Secretary of the Interior. The lands in

dispute were outside of the lines run by Deputy Surveyor Stratton, whose survey was confirmed by the Commissioner of the General Land Office November 11, 1878, but were within the lines of the subsequent survey of Von Leicht, which was made in accordance with the orders of the Secretary of the Interior. A patent was issued pursuant to a decree of the United States circuit court based upon the Von Leicht survey, which survey had been made under express orders from the Secretary for the purpose of properly locating the premises described in the decree.

The city of San Francisco had protested against the methods pursued in making the Stratton survey, and the city attorney appealed from the action of the Commissioner confirming the same to the Secretary. This action by the attorney was subsequently repudiated by the board of supervisors of the city, but the Secretary, nevertheless, after an examination of the points involved, reversed the action of the Commissioner, and ordered the Von Leicht survey to be made, thus sustaining the protest of the city against the Stratton survey.

The plaintiff insisted that the Stratton survey was a final adjudication by the land office of the location of the premises described in the decree, and that in confirming the said survey under the acts of Congress referred to in the case the Commissioner had acted in a special judicial capacity, and his decision was not subject to review by the Secretary.

Before this Court the argument was that the Stratton survey was correct and had never been legally set aside; that the Von Leicht survey, upon which the patent was issued, was wholly unauthorized by law and void, and that the premises in dispute being excluded from the Stratton survey, and having been proved to be below the line of ordinary high-water mark, were never legally included in the patent, and were not included in the decree of confirmation.

The Court said (p. 176):

"It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department within the scope of its authority is unassailable in the courts except by direct proceedings."

The referee, however, had decided that there was no authority in the department to make the second or Von Leicht survey, because the authority to survey had been exhausted by the action of the Commissioner of the Land Office in approving and confirming the Stratton survey. The finding was held not to be sound, because it would follow, as a rule of law, that the Secretary would be thereby shorn of the supervisory power over the public lands which is vested in him by section 441, R. S. U. S., and his general power of directing the survey and sale of the public lands under section 453, R. S. U. S. For the purposes of the decision the foregoing would seem to have been all-sufficient, but the learned Justice (Lamar), by way of illustrating the scope and extent of the supervisory authority of the Secretary over the acts of the Commission, deemed it desirable to quote *with approval* and *in extenso* the language of Mr. Secretary Lamar (5 L. D., 494) used when passing upon the application made to the department for the recall and cancellation of this same patent issued to the city of San Francisco; which language so quoted has passed into and formed the basis of the opinions of the lower courts in this case (p. —).

The most superficial examination of the case will be sufficient to demonstrate that neither the principle thereof nor the reasoning pursued has any application here.

In the case at bar the duty imposed upon the Secretary of identifying "swamp" lands is derived from the granting acts themselves, and those acts alone should be resorted to in determining its extent. Sections 441 and 453, R. S. U. S.,

upon the construction of which the Knight case turned, have no applicability here.

To demonstrate the futility of attempting to apply the general language quoted by the lamented justice to special cases, it is but necessary to refer to the conclusions reached in U. S. *ex rel.* McBride *vs.* Schurz, *supra.*

Upon examination the case of New Orleans *vs.* Paine, 147 U. S., 261, also relied upon by both of the lower courts, would seem to have even less bearing than the Knight case, if that were possible, upon the question in hand. Therein the Court said:

"It is quite evident from this correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the Land Office, and that no title ever vested in the plaintiff to the lands included in this survey, though defendant, having obeyed his instructions, was of course entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon final hearing."

Upon the weight of authority, the line of decision being practically, if not entirely, unbroken, the intentional approval by the Secretary of lists of "swamp" lands was the final action which closed the matter of title thereto so far as the department was concerned. In this respect the case is easily and plainly to be distinguished from the cases last above cited.

SECOND.

The beds of non-navigable lakes within States to which the title to the shore-lands has passed, are not subject to control or disposal by the United States as public lands.

The contention of the defendants is that after the lands in controversy had been listed to the State as "swamp" land, upon re-examination and consideration of certain *ex parte* affidavits and reports the conclusion was reached that said lands at the date of the granting act were not "swamp," but were the bed of a non-navigable lake. It is interesting to note that such finding was made at the instance of the very persons whose primary contention before the department had been that the lands were never "swamp" at all, but, on the contrary, had always been and were "dry."

But it is alleged in the bill (p. 17) and admitted by the demurrer that the so-called Lake Warner, if it existed at all, was a non-navigable body of water, and "that the title to each and every legal subdivision of shore-land adjacent to the lands in suit had long prior to the recession of the said waters passed out of the United States and become vested in the State of Oregon, and by mesne conveyances had become vested in" plaintiff.

It appears that the said shore-lands were "swamp" lands, and the title thereto which was conveyed to the State without reservation or restriction carried with it all the rights and privileges of riparian ownership, subject only to the laws of the State.

Pollard *vs.* Hagan, 3 How., 212.
Railroad Co. *vs.* Schurmeier, 7 Wall., 272.
Barney *vs.* Keokuk, 94 U. S., 324.
Hardin *vs.* Jordan, 140 U. S., 371.

It follows that the title to the bed of the so-called lake, if any such lake really existed, passed to the State and became subject to its disposition upon the vesting of the legal title to the shore-lands.

The statute books of Oregon except as below noted do not disclose any legislation on this subject save as to lands below the high-water mark of *navigable* streams (Bowlby *vs.* Shively, 22 Oregon, 427), and there seems to be no established usage with respect thereto.

In the absence of legislation or usage the common-law rule governs the rights of riparian proprietors.

Webber *vs.* Harbor Commissioners, 85 U. S., 65.

The act of October 11, 1862 (Deady & Lane's General Laws of Oregon, 278), provides general rules for construing the descriptive parts of conveyances of real property. The fourth section reads as follows:

"When a road or a stream of water not navigable is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance except when the road or bed of the stream is held under another law."

But for the purposes of this case it is unnecessary to determine whether the rights of riparian owners in Oregon is to be determined by the common-law rules or by legislative enactment or by some custom or usage, for, in addition to granting to plaintiff the shore lands, it appears that the State has also granted and patented to it the alleged submerged lands also. The State is not seeking to set aside its voluntary conveyance, and certainly third persons, not claiming any rights under the State, ought not to be permitted to question the grantee's title.

In Hardin *vs.* Jordan (*supra*) this Court held that the title to the beds of navigable as well as those of non-navigable streams vested in the States as soon as the abutting lands were conveyed to it without reservation by the United States.

If the State has disposed of the abutting or shore lands without reservation and the common-law rule prevails, then the title to the submerged lands passed along with that of the shore lands to its grantee. If the common-law rule does not prevail or the State has expressly reserved to itself the title to the submerged lands acquired by virtue of its sovereignty, then such title is subject to the future disposal of the State as it may by law, custom, or usage see fit.

"But grants of land bounded on rivers, or upon the margin of the same, or along the same above tide water, carry the exclusive right and title of the grantee to the center of the stream; the public, in cases where the river is navigable for boats and rafts, have an easement therein or a right of passage as a public highway. * * * It would require an express exception in the grant or some clear and unequivocal declaration or certain and immemorial usage to limit the title of the owner in such cases to the edge of the river. * * * If the same person be the owner of the land on both sides of the river, he owns the whole river to the extent of the length of his lands upon it." (2 Kent's Com., 427.)

When the United States has disposed of lands bordering on a meandered lake (non-navigable) by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed or the former bed of the lake is void and inoperative.

Lamprey *vs.* Metcalf (Minn.), 53 N. W. Reporter, 1139.

The title to the shore lands bordering on "Lake Warner," they being patented "swamp" lands, vested in the State of Oregon, as of March 12, 1860. Assuming defendants' contention that the *submerged* lands were "lake" and not "swamp" to be true, it follows that the United States was thereafter without title or jurisdiction over such submerged lands and had no authority even to survey them, much less to dispose of them to homestead, pre-emption, or timber-culture settlers.

MINOR POINTS.

1.

Upon the allegations of the bill of complaint the plaintiff is entitled to maintain its action.

It is alleged (pp. 5, 6, 7, 9, and 17) that title to the lands in suit passed to the State either under the swamp-land grant of March 12, 1860, or by virtue of its sovereign rights, or as riparian owner under grants from the United States; that, pursuant to the laws of Oregon, the said lands were by the State (p. 10) sold and conveyed in fee-simple to H. C. Owens, and by mesne conveyances (p. 11), "for a large and valuable consideration, to wit, $4 per acre in gold," were subsequently "sold and conveyed in fee-simple" to the plaintiff; all of which the demurrer admits. By reason whereof plaintiff (p. 11) "avers that it was and is a *bona fide* purchaser and owner of said lands in the full sense of that term."

A purchaser from the State of lands selected as swamp and overflowed, on making the first payment and receiving a receipt or certificate therefor, is entitled, if the land is in fact swamp or has been so designated by the Secretary of the Interior, to the possession thereof. He "is undoubtedly the legal owner of that (land) described in the deed, and as such may maintain ejectment, trespass, or replevin."

McConnaughy *vs.* Wiley, 33 Fed. Rep., 449, 452, 453.

And also a bill for an *injunction* against the State officers, even to the governor, if they or he seek to interfere with the possession thereof or title thereto.

McConnaughy *vs.* Pennoyer, 43 Fed. Rep., 196.
Same case, on rehearing, 43 Fed. Rep., 339.
Affirmed, 140 U. S., 1–25.

2.

Neither necessary nor proper parties defendant are lacking.

That the State of Oregon has parted with all of her title and interest in these lands appears from the bill. Cameron and Maupin, having received patents from the United States, are no longer subject to the control of the Land Department, and no relief is sought in these proceedings with reference to the lands patented to them.

In Williams *vs.* The United States, 138 U. S., 514, a bill was filed on behalf of the United States against Williams *alone* to annul an alleged illegal contract between Williams and the State of Nevada concerning certain lands erroneously certified to the State. Objection was made that the State was a necessary party to the action. It was held on appeal (Brewer, J.) that where there were outstanding two adverse titles to the same lands, the real owner could proceed to divest one without joining in the suit the claimant of the other.

It cannot be necessary in a suit of this sort to join with the plaintiff, who is the ultimate grantee, all the *mesne* conveyancers.

3.

Plaintiff has no adequate remedy at law.

It was suggested below that the relief prayed by the bill could be administered as effectively by *mandamus* as by injunction, and, the former being an action at law, it was proposed that equitable cognizance of this case should be denied on such ground.

The phrase "adequate remedy at law" pertains to and comprehends the ordinary and usual actions sounding in damages. It has no place or bearing where "extraordinary" proceedings are concerned. That *mandamus* would

lie is no objection to the maintenance of a bill for injunction. Of two extraordinary remedies, either of which would fit the case, the courts favor the one which will afford adequate relief with the least violence, and in actions concerning high officials courts are prone to grant *negative* rather than *affirmative* relief.

Usually, as in the present case, an injunction will afford ample relief, is the more expeditious, and merely stays the hand of the official.

See High, Extraordinary Remedies, § 6.

Where parties have invoked the aid of equity and that court is empowered to determine the controversy and to afford ample relief, "a court of law will refuse to lend its extraordinary power to determine a litigation which may as well be determined where begun." The fact that a court of equity has acquired jurisdiction of the same subject-matter, and has full power to grant relief or to *compel performance* of the thing sought, is a complete bar to the exercise of jurisdiction by *mandamus*.

High, Extraordinary Remedies, § 21.
Queen *vs.* Pitt, 10 Ad. & E., 272.
People *vs.* Warfield, 20 Ill., 160.
People *vs.* City of Chicago, 53 Ill., 424.
Hardcastle *vs.* Maryland, &c., R. Co., 32 Md., 32.

4.

The verification of the bill of complaint is sufficient.

Whatever irregularity there may be in this regard was expressly waived in the trial court, and the waiver was reaffirmed in the Court of Appeals.

Had the defect or irregularity not been so waived the bill could have been properly verified in open court.

Rev. Stats. U. S., sec. 954.
Black *vs.* Henry & Co., 42 Fed. R., 618.
Bank of England *vs.* Manufg. Co., 2 U. S. App., 282.

The use in the verification of the word "cattle" instead of "stock" is plainly the result of clerical inadvertence or mistake.

The point sought to be made is too trivial for discussion.

Upon the whole matter, it is submitted that the action was properly conceived and that the judgment of the Supreme Court of the District of Columbia, sustaining the demurrer and dismissing bill, and of the Court of Appeals, affirming the same, should be reversed.

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Solicitors for Appellant.

CHARLES A. COGSWELL,
JAMES B. MCCRELLIS,
Of Counsel.

APPENDIX.

1.

AN ACT to enable the State of Arkansas and other States to reclaim the "swamp lands" within their limits.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

"SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee-simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

"Approved, September 28, 1850." (9 Stats. L., 519.)

2.

AN ACT to extend the provisions of "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits" to Minnesota and Oregon and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the "swamp lands" within their limits,' approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon: *Provided*, That the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

"SEC. 2. *And be it further enacted*, That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.

"Approved, March 12, 1860." (12 Stats. L., 3.)

3.

AN ACT to quiet land titles in California.

"SEC. 4. *And be it further enacted*, That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such,

upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The Commissioner shall direct the United States surveyor general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval: *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor general to make segregation surveys, upon application to said surveyor general by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

"SEC. 5. *And be it further enacted*, That it shall be the duty of the Commissioner of the General Land Office to instruct the officers of the local land offices and the surveyor general, immediately after the passage of this act, to forward lists of all selections made by the State referred to in section 1 of this act, and lists and maps of all swamp and overflowed lands claimed by said State, or surveyed as provided in this act, for final disposition and determination, which final disposition shall be made by the Commissioner of the General Land Office without delay. * * *

"Approved July 23, 1866." (14 Stats. L., 219, 220.)

4.

Revised Statutes U. S., sec. 2488:

"It shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States."

165-28

Office Supreme Court, U. S.
FILED.
DEC 16 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WARNER VALLEY STOCK COMPANY, appellant,
v.
HOKE SMITH, SECRETARY OF THE INTERIOR, and Silas W. Lamoreux, Commissioner of the General Land Office. } No. 550.

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

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v.
HOKE SMITH, SECRETARY OF THE INTERIOR, and Silas W. Lamoreux, Commissioner of the General Land Office.
No. 550.

APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

The Warner Valley Stock Company, an Oregon corporation engaged in raising cattle for sale and having its principal place of business at Lakeview in that State, filed its bill for an injunction against the appellees, claiming that they were so proceeding as to cast a cloud upon its title to certain real property. The appellees demurred, and their demurrer was sustained by Judge Cox of the

Supreme Court of the District of Columbia. They appealed to the Court of Appeals of that District, which unanimously affirmed the decision, the opinion being written by Mr. Justice Shepard. They then appealed to this court.

The injunction prayed was in part mandatory. The prayers for specific relief were as follows, that for a mandatory injunction being italicized (p. 18):

> That the said Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, their subordinates and agents, may be restrained and enjoined from assuming to exercise further jurisdiction with respect to the disposition of lands described in Oregon swamp-land lists No. 30 and No. 31, and from further trespassing upon your orator's right of quiet possession thereof, *and that said defendant, Hoke Smith, may be commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands.*

The suit is practically one against the United States, to quiet title to property claimed by the latter. The United States, however, claims only for the purpose of patenting to certain persons known as "dry land claimants," provided the latter prove to have taken the proper steps to obtain vested rights in the land, upon receipt of the legal fees. In its ultimate analysis, therefore, the suit represents a controversy between the swamp land claimants and the dry land claimants, in which the rights of the latter are attacked without making them parties.

STATUTES RELIED ON.

The appellant relies upon the statutes of 1850 and 1860 with relation to swamp lands.

The act of September 28, 1850, c. 84, enacts as follows:

> § 1. That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, *shall be, and the same are hereby, granted to said State.*
>
> § 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, *and, at the request of said governor, cause a patent to be issued to the State therefor;* and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

The third section provides for a rule of classification for legal subdivisions which are not entirely swamp or over-flowed in character. § 4 extends the benefits of the act to "each of the other States of the Union in which such swamp and over-flowed lands, known and designated as aforesaid, may be situated."

This act was not applicable to Minnesota or Oregon, as they had not then been admitted to the Union. Its

benefits were extended to those States, with some qualifications, by the act of March 12, 1860, c. 5, § 1, as follows:

> That the provisions of the act [aforesaid] be, and the same are hereby, extended to the States of Minnesota and Oregon: Provided, That the grant hereby made *shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title* to be made under the authority of the said act.

The act of 1860 contained a further provision applicable to all of the other States as well as Minnesota and Oregon. It provided as follows:

> § 2. That *the selection* to be made from lands already surveyed [therein] shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, *after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.*

These provisions were re-enacted in the Revised Statutes as §§ 2479–81, 2490. This operated as a repeal of the statutes of 1850 and 1860 (§ 5596); but the repeal did not affect "any right accruing or accrued" thereunder, "but all rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made" (§ 5597).

MATERIAL FACTS PLEADED.

The lands in question were found by the Interior Department in the decision of December 19, 1893, to be

situated in what was once the basin of "a large body of water known as Lake Warner * * * which, according to the testimony of some of the witnesses, was too deep to be forded;" but "between 1874 and 1879 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry," the recession having been "quite rapid during the last two years prior to March 30, 1889" (p. 31).

These facts are disputed by the bill, which alleges that the lands were not on March 12, 1860, "covered by a permanent body of water, but, on the contrary, they were, as above stated, 'swamp lands,' and the supposed rapid recession of the waters referred to in the decision of December 19, 1893, was the result of ditching and draining by means of canals and otherwise, instituted by the predecessors in title of your orator" (p. 17). It appears to be admitted that the lands were situated in "what was termed Lake Warner" (p. 4).

We pass over certain averments of the bill (pp. 4–5) reciting alleged agreements between "officials of the Land Department" and of the State of Oregon, concerning the method of procedure in the selection of lands. These alleged agreements were not intended to be final, but subject "to favorable action thereon by the Commissioner of the General Land Office," and "to the claims of settlers who might have gone upon said lands under the provisions of the General Land Office passed prior to March 12, 1860." Nor do they seem to have had any legally binding effect, however far they may have bound the consciences of the officials who entered into them.

Although the Congressional grant was made in 1860, the public surveys were not extended to this region until 1887. They were completed and filed in the local offices late in 1888; and (pp. 4–5)—

> On or about December 29, 1888, the United States surveyor general of Oregon certified to the Commissioner of the General Land Office lists of certain lands, aggregating many thousand acres, included within the above-mentioned survey, designated by the smallest legal subdivisions, *part of said lands*, more particularly described hereinafter, *having been selected by the State of Oregon as swamp and overflowed lands*, the title of which it was alleged had inured to the said State by virtue of the provisions of the acts of Congress above noted.

While the bill alleges a selection by the State of Oregon, it will be noticed that the selection was somewhat premature, as the statute contemplates a prior "notice by the Secretary of the Interior to the governor of the State that the surveys have been completed and confirmed; nor is the selection alleged to have been made by the governor."

The lands in question are a portion of 10,831 acres embraced in the Surveyor General's certificate, which are alleged by the bill to have been "in the occupation of settlers" (p. 5). It would seem, however, that these settlers had as yet initiated no proceedings toward a legal claim upon the lands. In fact, they would not do so until the lands were surveyed. They did, however, initiate such proceedings during the year 1889 (pp. 12, 13, 32). The proceedings were contested by

the State of Oregon and its assignees, evidently claiming prior right on the ground that the lands were "swamp and overflowed" within the meaning of the statute. Many decisions were made in favor of the contestants, and the books of the General Land Office at Washington in 1892 showed that the claim of that State was "free from conflict by sale or otherwise." There were, however, some claims still pending which for some reason did not appear upon the books (pp. 12–13, 22–3, 26, 31).

The lands in question are to be found in part upon "list No. 30" and in part upon "list No. 31."

On March 19, 1892, the officials of the Division of Swamp Lands in the General Land Office at Washington certified that "list No. 30" contained swamp and overflowed lands which were found to be free from conflict by sale or otherwise by examination of the tract books; and that "under date of March 1, 1892, the register of the district land office at Lakeview reported that no claims adverse to that of the State for the tracts aforesaid appeared of record in his office." Upon this certificate the Commissioner of the General Land Office recommended approval of the list by the Secretary of the Interior. Secretary Noble thereupon signed a certificate as follows (p. 23):

> The foregoing list of swamp-land selections, containing one thousand nine hundred and seventy-six and fifty-one hundredths (1,976.51) acres, is hereby approved *subject to any valid adverse rights that may exist to the tracts of land therein described.*

Certified copies of this approval were sent to the local land office and to the governor of Oregon on May 4, having previously been noted on the proper books in the General Land Office. The governor requested patent by letter dated May 12 (p. 21).

"List No. 31" was similarly certified by the division of swamp lands on November 15, 1892; although no report had been made by the register of the district land office at Lakeview. The acting Commissioner recommended approval by the Secretary of the Interior, and the Secretary signed a qualified approval on December 3 in the precise language above quoted, except as to the number of acres (p. 27). The approval was noted on the books of the General Land Office, but no copy was sent to the local land office or to the governor.

On December 29 counsel for certain settlers or "dry land claimants" petitioned Secretary Noble "praying him to exercise his supervisory jurisdiction" in the premises. Briefs were filed by counsel upon both sides of the controversy, according to Secretary Smith (pp. 28–9), whose statements of fact are "made a part of this bill" (p. 13). The bill elsewhere alleges that appellant had no notice (p. 11). However this may be, Secretary Noble on March 2, 1893, "revoked and cancelled" his approvals of the two lists (pp. 11, 21, 23, 24, 27).

This, as construed by the Department, left the question open for further action. Mr. Noble went out of office immediately thereafter, and was succeeded by the appellee, Hoke Smith. Mr. Smith proceeded to consider the matter "without a hearing or trial, and without other

information than was afforded by the statements contained in certain *ex parte* affidavits, no opportunity having been granted to your orator for the examination of the affiants, who were persons desirous of obtaining possession of the aforesaid lands then in possession of your orator" (p. 12). According to the Secretary's statement, which is "made a part of this bill" (p. 13), certain attorneys for the assignees of the State of Oregon, prior to this hearing, "filed six papers containing arguments, statements and affidavits in support of their several contentions, of all which both sides have had notice" (p. 30). The Secretary states that the case was considered by him "with all parties interested present here by counsel, duly notified and fully heard, and after careful examination and supervision of the great mass of papers before me containing all the information accumulated during many years of eager, intelligent and industrious contest" (p. 30). These conflicting statements of the bill may be perhaps best reconciled by interpreting them to mean that the swamp land claimants vainly asked the privilege of oral cross-examination.

Secretary Smith rendered his decision December 19, 1893. He recites that "when the lists were presented to the Secretary of the Interior for his approval, they appeared to be clear lists of swamp and overflowed lands" shown by the tract books of the General Land Office to be "free from conflict by sale or otherwise. Upon these certificates the Secretary approved the lists." He further recites that the Secretary (Mr. Noble) revoked and cancelled his approval by reason of "information furnished

by the Land Office that adverse claims to tracts involved in said list were then pending in that office and had not been disposed of, and that the character of said lands was contested by adverse claimants" (p. 31). His ruling upon the question of law is as follows (pp. 31–2):

> The ruling of the Department is that the lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant (State of California, 14 L. D., 253). If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said lists are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

He therefore made the following direction (p. 32):

> I therefore direct that you cause all decisions recommending or holding for cancellation entries or declaratory statements, upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands by the act of March 12, 1860, to be set aside and annulled and the cases reinstated and all contests based upon said ground alone to be dismissed, and that you require all *bona fide* claims to such lands lawfully initiated to be prosecuted and perfected with all due diligence according to law and the rules of practice.

This opinion appears at 17 L. D., 571. A motion for a rehearing was made by "counsel for the grantees of the State of Oregon," which was overruled for reasons stated (pp. 33–4). Commissioner Lamoreux, on January 5, 1895, officially transmitted information of these decisions to the register and receiver at Lakeview, Oregon (p. 35), stating that "all filings or entries for any of

the above lands heretofore cancelled for reason of conflict with the claim of the State" were "this day reinstated" (pp. 38, 40).

Since that time the appellees have issued patents to two of the settlers and "are encouraging such alleged settlers to go forward and submit proof by way of perfecting such claims and entries," and threaten "to approve such proofs and to issue patents upon said filings and entries," so that the appellant's "peaceful possession of its said lands is being interfered with by multitudes of squatters claiming said lands under color of authority from the said defendants. Its cattle are driven astray, and the grass and other products of the soil to which it is entitled are diverted to the use of such squatters" (p. 16).

As an alternative to its claim under the grant of 1860, the appellant adds a claim that if the lands were actually under the waters of the lake, it was "a non-navigable lake, and that the title to each and every legal subdivision of shore land adjacent thereto, had prior and long prior to the recession of the said waters passed out of the United States and become vested in the State of Oregon, and by mesne conveyances has since become vested in your orator" (p. 17).

The bill fails to state either the date or the method of transmission of title by the United States to the State of Oregon; and therefore, as will hereinafter be shown, this point is worthless for the purposes of the present suit.

Appellant claims title from the State of Oregon as follows: That State did not wait for identification by the Interior Department before disposing of its swamp lands. It made provision for their disposition by acts of 1862 and 1870 (p. 9), and conveyed these lands in 1883 and 1884. During the latter year they all came into the hands of Richard F. McConnaughy and Martin McConnaughy, who, on January 15, 1892, conveyed them to the appellant for $4 per acre (pp. 10, 11).

ARGUMENT.

I.

The appeal should be dismissed on account of the resignation of Secretary Smith.

The court takes judicial notice of the principal offices under the Federal Government, and of the persons who at any given time held those offices. (*Keyser* v. *Hitz*, 133 U. S., 138, 146.) It is therefore aware of the fact that Mr. Hoke Smith resigned and vacated his office as Secretary of the Interior on September 1, 1896.

The administration of the swamp land grants is placed by statute in the hands of the Secretary of the Interior. The Commissioner of the General Land Office is not mentioned. The acts in this respect are harmonious with the "general administrative system" of the public lands. Whatever work is done by the Commissioner and other officials of the Land Office is ordinarily under the direction and supervision of the Secretary of the Interior. (*Orchard* v. *Alexander*, 157 U. S., 372, distinguishing *Butterworth* v. *Hoe*, 112 U. S., 50; Rev. St., §§ 437, 441, 453.)

This court has no jurisdiction over the present Secretary, Mr. Francis. The theory of the bill was that Secretary Smith was not acting in an official capacity, but as an individual, and without any authority of law. This was necessarily the theory of the bill, for if he was acting in an official capacity, the court would have no jurisdiction of the case. Mr. Francis is in no sense a party to this suit. He is not obliged to act through Commissioner Lamoreux; and Commissioner Lamoreux must obey his orders or resign.

It thus appears that the controversy now before the court is but a moot case. If this court is willing to hear the moot case and decide it with full deliberation as if it were a genuine case, it may be presumed (although the undersigned of course have no authority to speak for him) that Mr. Francis will defer to whatever opinion it may express. The court, however, has ordinarily disavowed all jurisdiction over moot cases. (*Mills* v. *Green*, 159 U. S., 651, and cas. cit.; *New Orleans Flour Inspectors* v. *Glover*, 160 U. S., 170; *Long* v. *Lochren*, decided October 26, 1896.)

Had the complainant been successful, and had the appeal been taken by the Secretary and the Commissioner, the case would be quite different. An injunction would then stand upon the record against the Commissioner in a suit to which his present superior would not be a party; and he would be obliged to prosecute the appeal, unless the decision below were vacated. Since, however, the courts below have refused to enjoin the officers sued, and the real defendant has retired from office, it seems clear,

upon principle and authority, that an appellate tribunal should not interfere.

There is no real hardship upon the appellant. It was merely ill-advised in commencing the proceeding; for, assuming that Secretary Noble's qualified approval of the lists transferred title to the lands listed, and assuming also that the Supreme Court of the District of Columbia had jurisdiction to control the actions of Secretary Smith by *mandamus* or injunction, so long as he should remain in office, the suit was liable to fail at any moment by his death or resignation. This was pointed out long ago by Attorney General Butler in his arguments in *United States* v. *Kendall*, 5 Cranch C. C., at p. 225, and many suits and proceedings have since failed from the same cause. The appellant attempted a supposed new short cut, and now finds that it is not short. It should have gone into court in the usual manner in its own State, as was done by a corporation similarly situated in *Michigan Land & Lumber Co.* v. *Rust*, 31 U. S. App., 731, now on the docket of this court (No. 331).

II.

Assuming the qualified approvals of 1892 to have transferred a title which enured to appellant's benefit, still the bill shows no case for equitable relief against either the Secretary of the Interior or the Commissioner of the General Land Office.

This is in effect a suit against the United States to quiet title to a certain number of acres of land. Were the suit brought directly for this purpose, it would not be maintainable. (*Stanley* v. *Schwalby*, 162 U. S., 255.)

Usually that which can not be done directly can not be done indirectly. In this case, however, it is claimed by appellant that the result can be accomplished under the analogy of *Pennoyer* v. *McConnaughy*, 140 U. S., 1.

This claim is founded on *Noble* v. *Union River Logging R. R. Co.*, 147 U. S., 165, where a bill for injunction against a former Secretary of the Interior was sustained by this court in a case having some analogies to the present one. That decision has given rise to a new branch of litigation which bids fair to become very extensive. It marks out a very convenient way of getting decisions from this court upon points of law, provided the incumbents remain in public office long enough for the suits against them to reach this court and be decided. In order that this may happen, the court is asked to advance the cases so that they may be heard and decided before a change in the *personnel* of the executive department.

No argument was submitted to this court on behalf of the Government upon the questions of procedure involved in the Noble case. It was tacitly conceded by the Assistant Attorney General who had charge of that case (probably because the government desired a decision upon the merits), that a bill for an injunction against the Secretary of the Interior was the proper method of settling the controversy. As the question of procedure was thus decided without the assistance of counsel, the undersigned feel it to be their duty to call this court's attention to certain considerations which may have been overlooked, although the case, upon one vital point, is entirely distinguishable.

The theory of this suit is as follows: That the lands in question were on March 12, 1860, either swamp lands or lands under unnavigable waters, which belong to the riparian owners. That if they were swamp lands, they were granted to Oregon on that day *in præsenti*, the grant being in the nature of a float. That the approvals of the land lists by the Secretary of the Interior in 1892 identified these lands and transferred title from the United States. That the title so transferred related back to the date of the grant and cut off all pre-emptors and other intervening settlers who had not actually obtained patents. That if the lands were not swamp lands on March 12, 1860, but were under unnavigable waters, the title thereto passed from the United States to the State of Oregon by prior transfers.

It will be perceived that the complainant, if its own theory is correct, has a clear remedy at law, notwithstanding the fact that no patent has as yet been issued for the land. (*Curtner* v. *United States*, 149 U. S., 662.) Actions in ejectment have been brought under similar circumstances in a number of familiar cases. (*Wright* v. *Roseberry*, 121 U. S., 488; *Tubbs* v *Wilhoit*, 138 U. S., 134; *Heath* v. *Wallace*, 138 U. S., 573; *Michigan Land & Lumber Co.* v. *Rust*, 31 U. S. App., 731; *Same* v. *Pack*, id., 757.)

We shall argue that complainant has no remedy in equity, and especially against these appellees, for the following reasons: (1) This case does not come within the limits within which the Federal courts have long circumscribed their interference with the executive branch of

the Government; (2) it does not come within any class of cases in which equity asserts concurrent jurisdiction in such matters; and (3) there is a fatal defect of parties.

(1) *The facts of this case do not bring it within the very narrow limits within which the courts issue process directly against high officers of the executive branch of the Government.*

The general principle governing the issuance of injunctions against heads of executive departments was laid down by Mr. Justice Miller in *Gaines* v. *Thompson*, 7 Wall., 347, 352–4, as follows, after discussing the earlier authorities in *mandamus* cases and showing that that writ can issue only to compel the performance of a ministerial duty:

> It may, however, be suggested that the relief sought in all those cases was through the writ of *mandamus*, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine, that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly

before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of *mandamus*.

In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Accordingly, in the case of *The State of Mississippi* v. *Johnson*, which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the Chief Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

* * * * *

The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the executive department—has

> sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

The injunction here sought is in part restrictive, in part mandatory.

(*a*) *Clearly no mandatory injunction can be issued in such a case.*

The court is asked "that said defendant Hoke Smith may be commanded and enjoined to prepare, for issuance unto your orator, in accordance with law, patents for said lands."

If he had not approved the lists, it is undisputed that he could not be forced to take the matter up for consideration.

In *French* v. *Fyan*, 93 U. S., 169, 173, the controversy arose under this very swamp land act of 1850. The Secretary of the Interior neglected or refused to do his duty in the premises, and it appeared that he had made no lists and "would issue no patents." The question thus arose whether he could be forced to do his duty in the premises as an inferior judicial tribunal may be forced to take up and decide some lawsuit which it has neglected. The court, speaking by Mr. Justice Miller, held that he could not be forced to do so; and for this reason justified a former decision in *Railroad Co.* v. *Smith*, 9 Wall., 95, allowing litigants to prove swamp

land titles by parol evidence when the Secretary unreasonably refused to act. The learned justice said:

> There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty. *Gaines* v. *Thompson*, 7 Wall., 347; *Secretary* v. *McGarrahan*, 9 id., 298; *Litchfield* v. *The Register and Receiver*, id., 575.

His remarks have recently been quoted with approval by this court in *McCormick* v. *Hayes*, 159 U. S., 332, 342. (See also *Commissioner of Patents* v. *Whiteley*, 4 Wall., 522; *Marquez* v. *Frisbie*, 101 U. S., 473, 475.)

The qualified approvals of Secretary Noble are not sufficient to take the case out of the rule thus stated, because they are expressly made "subject to any valid adverse rights," and the ascertainment of this fact is clearly an executive, as distinguished from a ministerial, act.

The case of *Butterworth* v. *Hoe*, 112 U. S., 50, is not in point. That was an application for a *mandamus* against the Commissioner of Patents to compel him to execute and deliver a patent for an invention: and the application was granted. The analogy of that case, however, is incomplete in two respects: first, he had adjudicated all the questions of law and fact involved in the case; and second, he was perfectly satisfied with the decision which he had reached, and desired no rehearing. The record was so shaped that the case turned upon a single question, namely, whether the Secretary of the

Interior had appellate jurisdiction over the Commissioner. This question being decided in the negative, the preparation and execution of the patent under the circumstances became merely ministerial acts. (See discussion of this case in *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40, 49.) Whether the Commissioner, having once filed an opinion upon the case, has the power to grant a rehearing, was a question not before the court. Doubtless, by a familiar rule of administrative practice, one Commissioner would not undertake thus to review the decisions of his predecessor; but this rule is merely an administrative one, and there can certainly be no doubt that a Commissioner has the same power as a judge to grant rehearings as to his own decisions, before they have been made the basis of more formal documents.

(*b*) *Similarly, no affirmative relief is obtainable against the Secretary by the dry land claimants.*

Besides the mandatory relief prayed as above set forth, this bill asks that the Secretary and Commissioner, their subordinates and agents, may be "restrained and enjoined from assuming further jurisdiction with respect to the disposition of" these lands. In other words, it is prayed that they may be restrained and enjoined from issuing patents to the dry land claimants. The controversy, it will be remembered, is really between the swamp land claimants and the dry land claimants, each maintaining a claim to patents for these same lands, the merits of the controversy depending upon the construction of certain statutes and department records. If the decision whether a patent should issue is an act executive in nature, so

that the dry land claimants can not obtain it by writ of *mandamus*, is it either reasonable or equitable that its executive character should be held to be so far taken away that the swamp land claimants can obtain a writ of injunction for its prohibition?

Let us assume that the law, when properly construed, is clearly in favor of the dry land claimants, and that the facts are likewise undisputed. Why should they not be entitled to a writ of *mandamus* if the swamp land claimants, assuming the facts and law properly interpreted to be in their favor, are entitled to an injunction? We respectfully submit that the distinction is untenable for two reasons:

(*c*) *When the doing of an act involves sufficient executive discretion to bar a writ of mandamus, it involves sufficient executive discretion to bar an injunction.*

This seems clearly to follow from the principle laid down in *Gaines* v. *Thompson*, *supra*, and exemplified by many other decisions of this court. The remedies are correlative.

(*d*) *A decision in favor of the swamp land claimants, like a decision in favor of the dry land claimants, would involve a question of documentary construction arising upon various statutes and departmental records, and this is sufficient to invest it with the quality of executive discretion and bar direct interference of the courts.*

The case of *Litchfield* v. *Register and Receiver*, 9 Wall., 575, is directly in point.

That case arose under the Des Moines River Improvement grant of 1846, and subsequent legislation *in pari*

materia. Mr. Litchfield, the complainant, claimed under the grant. The legislation is set forth in many opinions of this court, among which we may refer to *Bullard* v. *Des Moines R. R.*, 122 U. S., 167. Congress having granted alternative sections along the Des Moines River to the territory of Iowa in 1846 (p. 169), certain certifications were made by one of the Secretaries of the Treasury which, in a case to which Mr. Litchfield was a party, were held to be illegal (pp. 170–1). Congress thereafter, in 1862, granted to that State the whole of the territory in controversy, the title enuring to the benefit of *bona fide* purchasers from the State (pp. 171–2).

Mr. Litchfield, after this legislation, filed a bill in equity in the Circuit Court for the District of Iowa against the register and receiver of the land office at Fort Dodge in that State, "asking an injunction to restrain them from entertaining and acting upon applications made to them to prove preemptions to certain lands which lay within the land district for which they were respectively register and receiver." (9 Wall., at p. 576.) The bill set forth very fully the acts of Congress and of the State of Iowa by which complainant maintained that the land in question through this grant had become his property. The grant has frequently been held by this court to have been one *in præsenti*. (*United States* v. *Des Moines Navigation & Ry. Co.*, 142 U. S., 510.) Mr. Litchfield thus set forth a case very similiar to that which is made by the present bill, if appellant's position upon the merits is correct: namely, a series of statutes and executive documents which showed him to be the

legal owner of the premises through grants by the United States. His claim was the same: namely, that the bill "showed that the land officers were exceeding their authority and would give certificates of preemption and entry which would cloud and embarrass his title and that they should therefore be restrained" (p. 576). Nevertheless, the bill was dismissed on demurrer for want of equitable jurisdiction. The opinion is by Mr. Justice Miller, and is based upon two principles, each of which is fatal to the present bill. We incorporate the opinion in full so far as relevant to the question now under consideration (pp. 577–8):

> The principle has been so repeatedly decided in this court, that the judiciary can not interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines* v. *Thompson*, decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary* v. *McGarrahan*, of the present term, reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the land department.
>
> It is insisted, however, by the complainant, that the present case does not come within the rule so laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of preemption, and grant certificate of entry. There are within that district, of course, lands open to sale and preemption. There would be no use for the land office if there were not. The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department

> finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

That Congress has not intended to impose upon executive officers the duty of defending causes of this kind is emphasized by the fact that the defense, as above remarked, must be "at their own expense." The costs are also chargeable upon them personally, unless they can obtain relief from Congress, and in *mandamus* cases the court can not even direct that no costs shall be recovered (*United States* v. *Schurz*, 102 U. S., 407).

The Litchfield case thus applies to injunction suits the same rule which has already been thoroughly settled by decisions of this court upon *mandamus* proceedings; namely, that judicial process will not issue against officers of the co-ordinate executive branch of the government when the point at issue involves the construction of ambiguous statutes or documents.

This ruling was first established in the well known case of *Decatur* v. *Paulding*, 14 Pet., 497, upon full discussion. Two justices dissented upon this point, but there has never been any dissent in the decisions which have followed it. The rule doubtless gives a narrower scope to the remedies of *mandamus* and injunction against executive officers than exists in most of the States, where these summary remedies are a favorite method for obtaining the settlement of difficult statutory

problems. The narrowness of Federal jurisdiction in this matter is doubtless due to the very powerful contest which was made in *Kendall* v. *United States*, 5 Cranch C. C. 163; 12 Pet., 524, against the constitutional power of Federal courts to issue writs enforceable only by contempt proceedings against high officers of a co-ordinate branch of the Government. The protest of Postmaster General Kendall and official opinion of Attorney General Butler upon this point will be found at 5 Cranch C. C., pp. 192–9, 221-5. While the dissenting justices in the Kendall case united with their brethren in overruling the constitutional point (12 Pet., p. 626), nevertheless, doubtless prompted by considerations of comity and out of respect to the prevalent theory of the mutual independence of the three branches of the Government, the court restricted their jurisdiction to very narrow limits (pp. 611, 613, 614, 624).

The Decatur case came up two years later before the same nine justices; and it is noticeable that Chief Justice Taney, who filed an individual opinion in the first case, and spoke for a majority of the court in the second, had been the head of the Treasury Department as well as Attorney General, while Mr. Justice Thompson, who spoke for the majority of the court in the first case, had been Secretary of the Navy, and Mr. Justice McLean, who filed an opinion in the second case, had been Postmaster General and also Commissioner of the General Land Office. The Decatur case turned upon the question whether an act could be enforced as ministerial when the statute directing its performance was ambiguous and it involved the

payment of money out of the public Treasury. Justices Story and McLean, while holding that Secretary Paulding had correctly interpreted the joint resolution under which Mrs. Decatur claimed a right in the navy pension fund, nevertheless said that the question of interpretation properly came up in a *mandamus* proceeding, the latter justice saying (p. 517):

> I differ from a majority of the judges, who hold that the construction of this resolution, giving to the relatrix a pension, is a duty in the discharge of which an executive discretion may be exercised. The law is directory and imperative, and admits of no discretion on the part of the Secretary.

Mr. Justice Baldwin was of the same opinion upon this point, and stated it very clearly (p. 606):

> If the right of the relator was in all other respects clear, except so far as they depended on the construction of the acts of Congress, the case was of judicial cognizance only. The duty of a Secretary is not judicial; it is not his province to construe laws.

Mr. Justice Catron put his concurrence mainly on the ground that the writ sought would force money out of the public Treasury, saying that the act directed in the Kendall case "was no more an official act than the making of an entry by a clerk by order of a court of justice," and adding: "Had it not been placed on this narrow ground the decision could not have been made" (p. 521).

Chief Justice Taney's opinion was concurred in by five members of the court. He expressly refused to

consider the true construction of the joint resolution, saying (p. 517):

> As we have no jurisdiction over the acts of the Secretary in this respect, we forbear to express any opinion upon the construction of the resolution in question.

As one of the grounds for holding that the Secretary in considering Mrs. Decatur's pension was not acting ministerially, he named the fact that it involved the construction of ambiguous provisions, saying (p. 515):

> He must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only or under both, and, if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment in deciding whether the half pay allowed her was to be calculated by the pay proper or the pay and emoluments of an officer of the Commodore's rank.

He also laid down the rule that presumptively the duties of Cabinet officers are executive and not merely ministerial (p. 515):

> The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He

> must exercise his judgment in expounding the law and resolutions of Congress under which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department, and if they supposed his decision to be wrong they would of course so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them.

It has been long settled in *mandamus* proceedings against executive officers that an act involving the construction of an ambiguous law is not ministerial but executive in nature, and therefore will not be controlled by the courts. (*Brashear* v. *Mason*, 6 How., 92, 102; *Reeside* v. *Walker*, 11 How., 272, 289; *United States* v. *Guthrie*, 17 How., 284, 304; *Carrick* v. *Lamar*, 116 U. S., 423, 426; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40; *United States* v. *Lynch*, 137 U. S., 280, 286; *Seymour* v. *South Carolina*, 2 D. C. App., 240.) Thus it has been said that an act, although otherwise purely ministerial, will not be directed in a case of doubtful right (*Redfield* v. *Windom*, 137 U. S., 636, 644), and that the duty must be "clear and indisputable." (*International Contracting Co.* v. *Lamont*, 155 U. S., 303, 308.) That the same principles apply to the correlative remedy of injunction we have already shown by the Gaines and Litchfield cases, *supra*.

In *Seymour* v. *South Carolina*, *supra*, the Court of Appeals of the District of Columbia reviewed all of the decisions of this court in *mandamus* cases, and pointed out that, since the Kendall case, only two writs have been approved: one in *United States* v. *Schurz*, 102 U. S., 378, where, title to land having already indisputably passed out of the United States by execution of letters patent, the Secretary of the Interior was directed to perform the purely ministerial act of delivering the document; and, second, in *Butterworth* v. *Hoe*, *supra*, where the Commissioner of Patents prepared his return for the purpose of excluding all discretionary elements from the case, and making it turn upon the question whether his decision was reviewable by the Secretary of the Interior (112 U. S., at p. 53).

Many injunctions and writs of *mandamus* have been granted against State officials; but they are not in point, since the rule of *Decatur* v. *Paulding* is based on respect for a co-ordinate branch of the Government, while all branches are supreme over State officials within the Federal sphere of action. Writs of *mandamus* against court officers rest upon a principle of their own, being merely incidental to the proper conduct of judicial business, and ancillary to other litigation.

Up to the year 1893 we are unable to find the affirmance of a single injunction against a Federal officer upon the records of this court, except, under special statutory provisions to that end (now Rev. St., § 3636), in *United States* v. *Nourse*, 9 Pet., 7. Other applications had failed for various reasons. (*Litchfield's Case*, *supra*; *Snyder* v. *Marks*, 109 U. S., 189.)

In 1893 came the case of *Noble* v. *Union River Logging R. R. Co.*, 147 U. S., 165, upon which complainant relies. As it was without precedent, it is somewhat noteworthy that the Assistant Attorney General in charge of the appellant's interests made no contest as to the right to enjoin. Either because the Department desired a definite ruling from this court upon the meaning of the statute, or for whatever other reason, he simply argued the case upon the merits, precisely as it had presented itself to the Secretary.

The Noble case must be regarded as an extreme one, and perhaps not to be given as much weight as if the points of procedure had been raised by counsel. For this reason we shall argue that it is not to be regarded as a conclusive authority upon suits to remove a cloud upon title (see *Chase* v. *United States*, 155 U. S., 489, which overruled 22 prior cases where the point had not been raised, pp. 494–5).

Upon the present point, however, the Noble case supports the position taken by us. Nothing in the opinion indicates an intent to overrule the distinction between executive and ministerial acts. This distinction is set forth in the opinion, Mr. Justice Brown saying (p. 171)—

> That with respect to the former, there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties, an act or refusal to act is or may become the subject of review by the courts. * * * Indeed, the reports of this court abound with authorities to the same effect [citing cases]. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

The statute upon which the case turned contained no ambiguity. The question there, as here, was whether the simple approval of a survey by the Secretary of the Interior was sufficient to pass title, or whether a patent was necessary. The act in question (act of March 3, 1875, c. 152, § 4) made no reference to any patent, but provided that the company should "file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." All the judges before whom the question was brought were unanimous in their opinion upon it.

In the present case the approval is not absolute, but qualified; it was not preceded by any request from the governor of the State; the statute expressly requires a patent; and four learned and careful judges, who have heard full argument upon the question, have already declared the approval insufficient to transfer title, and the question therefore one still pending in the Interior Department. Assuming that there may be great force in the appellant's contention, nevertheless the opinions of these four judges would seem sufficient by themselves to prove the statute sufficiently ambiguous to defeat any claim that the Secretary's act was ministerial or that his assumption of authority to reconsider the case was in violation of an unambiguous law. (*Lochren* v. *Long*, 6 D. C. App., 486, 505.)

(2) *This is not one of the cases in which equity exercises concurrent jurisdiction.*

Although, as above shown, appellant has a remedy at law if its claim is well founded, it insists that the remedy is not adequate and that it has the right to appeal to chancery for relief, on the ground that the patents which the appellees threaten to issue will be clouds upon its title, and on the ground that it will be involved in a multiplicity of actions.

(*a*) *Clouds on title.*—Appellant claims that the qualified approvals of Secretary Noble in 1892 transferred the title to the property, so that it could be recovered by the United States only through judicial proceedings. It insists that the same Secretary's revocation of those approvals was a nullity, and is so well satisfied of that fact that it does not even ask to have the revocations cancelled. If the approvals did transfer title, the revocations were doubtless nullities, and all subsequent proceedings by the Interior Department with relation to these lands would be entirely ineffectual. To establish their invalidity it will not be necessary to produce any parol evidence. It will be established by the written approvals themselves, which have not been erased or obliterated, but remain upon the records.

In other words, appellant is praying the chancellor to enjoin, as clouds upon its title to land, the issuance of patents which will appear on their face to have been issued after the United States has parted with all its right to convey.

It is submitted that this can not be done.

The rule of equity, as usually laid down, is that an instrument is a cloud on title only when extrinsic evidence is necessary to establish its invalidity; but that, if no extrinsic evidence is required, and the alleged cloud is either void upon its own face, or shown to be void by evidence which its proprietor must necessarily produce to maintain his title thereunder, it is not enough of a cloud for the chancellor to take cognizance of, and the complainant will be left to his action at law. (*Hannewinkle* v. *Georgetown*, 15 Wall., 547, 548; *Phelps* v. *Harris*, 101 U. S., 370, 375; *Chapman* v. *Brewer*, 114 U. S., 158, 171, and cas. cit.; *Mackall* v. *Casilear*, 137 U. S., 556, 564; *Robb* v. *Vos*, 155 U. S., 13, 38; *Rich* v. *Braxton*, 158 U. S., 375, 405–7.)

In *Van Wyck* v. *Knevals*, 106 U. S., 360, 370, Mr. Justice Field said, citing his own very clear discussion of the subject in *Pixley* v. *Huggins*, 15 Cal., 128:

> The existence of the patent also creates a cloud upon the title of the land. Every instrument purporting by its terms to convey land *from the original source of title*, however invalid, creates a cloud upon the title, *if it require extrinsic evidence* to show its invalidity.

It is submitted, however, that this proposition is properly subject to an exception in the case of an instrument coming from the original source of title, but which shows on its face that it is subsequent to complainant's own deed. Such an instrument would, indeed, require extrinsic evidence to show its invalidity if its holder were plaintiff in the action at law. But if the real owner were able to bring an immediate action at law against the

holder of the instrument, he would put his own deed in evidence first. The subsequent instrument, when introduced, would be shown invalid by its date without further proof. The reason of the general rule would apply, and equity should not interpose, but should remit the complainant to his adequate and speedy remedy at law.

The rule, then, should be so stated as to bar equitable jurisdiction when complainant is so situated that he can bring an immediate action at law against the holder of the false claim, and when the latter's deed, when offered by him in defense, will require no extrinsic evidence to show its invalidity.

The rule is much more strongly stated by the New York Court of Appeals in a case very similar to the one at bar, where defendant's title was good on its face, except that it appeared to be subsequent to complainants'. (*Bockes* v. *Lansing*, 74 N. Y., 437, 441.) Rapallo, J., said:

> It is only where there is an instrument or proceeding which on its face purports to create or convey a title *paramount to that of the party seeking relief*, or an incumbrance thereon, that an action will lie to set aside such instrument or proceeding as a cloud upon the plaintiffs' title.

A deed between strangers is void on its face, but is not a cloud upon title. (*Welden* v. *Stickney*, 1 D. C. App., 343; see *Nickerson* v. *Loud*, 115 Mass., 94, 97.) This has recently been held in *Thompson* v. *Etowah Iron Co.*, 91 Ga., 538, upon a full review of the authorities by Lumpkin, J. But the United States, if it has transferred title to appellant, is now a stranger, and can not cloud

the title by any patent to a third party. (See *Moore* v. *Cord*, 14 Wis., 213; *Reyes* v. *Middleton*, 36 Fla., 77.)

We are aware that the same objection could have been taken in *Noble* v. *Union River Logging R. R. Co.*, *supra*. But that decree seems to have been in disregard of all the authorities above cited; for the order revoking the Secretary's approval could not have been put in evidence without showing the approval itself. It is therefore believed that the objection would have been sustained if made by counsel, the case being much weaker for the complainant than the case at bar.

(*b*) *Multiplicity of actions.*—Prevention of this evil is a well recognized basis for equity's concurrent jurisdiction. Appellant's difficulty here is with the facts of the case. The "dry land claimants" appear by the bill and the exhibits therein incorporated to have taken sufficient steps to secure vested interests in the land, although two patents only have been issued. This being so, the claimants, not being parties to the present suit, can not be bound by its result. Suppose that a decree should be entered against these defendants. Actions in ejectment would still have to be brought against the claimants, and they could defend the actions, whether or not they had received patents. If the Oregon courts should hold that Secretary Noble's approvals were revoked, so that the swamp land claimants had as yet received no title, then the dry land claimants would remain undisturbed. If the lands are not swamp lands, they may all have equitable rights therein under *Johnson* v. *Towsley*, 13 Wall., 72; *Monroe Cattle Co.* v. *Becker*, 147 U. S., 47; *Ard* v.

Brandon, 156 U. S., 537, and similar cases. Those who claim under the preëmption act, indeed, would seem to have good claims irrespective of the question whether the lands were dry or swamp; for the preëmption act antedates March 12, 1860, and its repeal for the purpose of immediate reincorporation in the Revised Statutes can hardly be held to take it out of the provisions of the statute of that date, which was itself repealed and reincorporated at the same time. "No adjudication against the Government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued." (*Ard* v. *Brandon*, at p. 541.) Similarly, no adjudication against an officer of the Government to stop the issuance of a patent can estop an individual not a party to the suit from setting up his equitable rights thereto.

Viewed as a decision in a moot case, the opinion of this court would have great weight against the dry land claimants in actions of ejectment; but they would be entitled to appeal their cases to this court and seek to have the decision overruled. Multiplicity of actions, therefore, can not be avoided in this manner by appellant.

(3) *The issuance of patents to dry land claimants can not be enjoined in a proceeding to which they are not parties and in which they are not represented.*

This seems to be elemental. (*Gregory* v. *Stetson*, 133 U. S., 579; *Shields* v. *Barrow*, 17 How., 129; *Coiron* v. *Millaudon*, 19 How., 113; *Butcher* v. *City of Camden*, 29 N. J. Eq., 478.) The case of *Litchfield* v. *Register*

& Receiver, 9 Wall., 575, 578, is precisely in point. Mr. Justice Miller, delivering the opinion of the court, said (pp. 578–9):

> Another objection, equally fatal to the bill, is the want of necessary parties.
>
> It appears on its face that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defence, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

III.

Appellant received no title by the qualified approvals of 1892.

We shall endeavor to show (1) that the swamp land grant of 1860 to the State of Oregon was not a grant *in præsenti;* (2) that whether it was *in præsenti* or not,

nothing vested in the State of Oregon until final identification by the Secretary of the Interior; (3) that such identification is not a finality until the issuance of the patent; (4) that, assuming a patent in the ordinary form not to be a necessary formality, these qualified approvals were not sufficient to fill its place; and (5) that no identification was possible until after a request by the governor of the State.

(1) *The Oregon swamp land grant was not a grant in præsenti.*

It seems to have been assumed in the lower courts that the Oregon swamp lands were granted to the State *in præsenti*, because those of other States had been so granted. The entirely different character of the grant to Minnesota and Oregon seems to have been overlooked.

It is true that the act of 1860 incorporates by reference the language of the act of 1850 to the effect that the "swamp and overflowed lands, made unfit for cultivation, which shall remain unsold at the passage of this act, shall be, *and the same are hereby, granted* to said State." These words taken by themselves import a present grant; and taken in connection with the other provisions of the statutes in question, they have been held to effectuate such a grant in the great majority of statutes of the same character which have been construed by this court. The question, however, is always one of intent, and these words "and the same are hereby granted" do not effectuate a present grant except when the statute, examined as a whole, indicates such to have been the intent of Congress.

This is well shown by *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S., 634. That case arose under the school land grant contained in the act of March 21, 1864, c. 36, enabling the people of Nevada to form a State government. § 7 of said act provides as follows:

> That sections numbered 16 and 36, in every township, and where such sections have been sold, or otherwise disposed of by any act of Congress, other lands equivalent thereto in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, *and are hereby, granted* to said State for the support of common schools.

The lands in question were situated in section 16 of a certain township. Plaintiff claimed under a grant from the State of Nevada. Defendant claimed under a subsequent grant from the United States, the land being mineral in character. The land was first surveyed after defendant had claimed and occupied it "in conformity to the laws, customs, and usages of miners" in that locality.

The Supreme Court of Nevada found that the school land grant "did not constitute a grant *in præsenti*, but an inchoate and incomplete grant, until the premises were surveyed by the United States and the survey properly approved;" and that the lands in question did not pass to the State upon the approval of the survey, because "excluded therefrom by reason of their having been previously possessed and occupied by defendant's grantors for mining purposes in conformity," etc.

This court, speaking by Mr. Justice Davis, said (pp. 638–40):

> It is true that there are words of present grant in this law; but, in construing it, we are not to look at

> any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. * * * *Schulenberg* v. *Harriman*, 21 Wall., 44, establishes the rule that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense." We do not seek to depart from this sound rule; but, in this instance, words of qualification restrict the operation of those of present grant. Literally construed, they refer to past transactions; but evidently they were not employed in this sense, for no lands in Nevada had been sold or disposed of by any act of Congress. There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. * * * Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them.

The court, in affirming the judgment of the Supreme Court of Nevada, say: "These views dispose of this case;" although the decision was based upon another ground also (p. 641).

The act of 1850, granting the swamp lands of all the States then admitted to the Union, contained an ambiguity, using words of present grant in the first section, while the second section provided that the fee simple to the land should vest on the patent. It was clear, however, that the statute contemplated a present grant, since no right was reserved to the United States to dispose of the lands in any other way. The Interior Department, therefore, held that a title to the lands, when identified

according to law by the Interior Department, related back to the date of the grant; and this ruling has been sustained by a series of decisions of this court which are set forth in full in *McCormick* v. *Hayes*, 159 U. S., 332.

It is submitted that these decisions are altogether inapplicable to the statute of 1860. That statute excepts from the grant "any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) *prior to the confirmation of title* to be made under the authority of" the act of 1850. This confirmation of title is accomplished by the action, not of the grantee, but of the grantor's agent, the Secretary of the Interior. The bill first passed the Senate without the exception (Cong. Globe, February 28, 1859, p. 1431), which was inserted upon the reintroduction of the bill, after conference with the Interior Department and mature consideration. (Id., March 1, 1860, p. 935.)

Upon the completion of surveys, for instance, the land was thrown open to preëmptors under the act of 1841. They might at once proceed to take necessary steps to obtain a vested interest in the land. As soon as these preliminary steps should be taken, the lands would be "disposed of" within the meaning of the statute. (*Heydenfeldt's Case*, *supra*, at pp. 640–1.) The period allowed for the State to select such lands after the survey would be at least two years and perhaps much longer. (Act of 1860, § 2.) The governor of the State was allowed this full period of time for making his selection, and he could not make it until he received from the

Interior Department "an accurate list and plats of the land." (Act of 1850, § 2.) It might thus well be that the United States would dispose of many thousands of acres of swamp and overflowed land prior to its confirmation of title.

If the act of 1860 were to be construed as a present grant, it would be an absurdity. It would read: "We grant you this land, but we reserve the right after a certain period to give it away to somebody else; and it is for us, not for you, to determine when that period shall expire." This absurdity was recognized by the Supreme Court of Oregon in the first case arising under the act (*Gaston* v. *Stott*, 5 Ore., 48, speaking by McArthur, J.), and, in order to avoid the absurdity without abandoning the theory of a present grant, the court held that *the exception to the grant was void for repugnancy.* This position was disavowed by one of the judges in the later case of *Miller* v. *Tobin*, 16 Ore., 540, 556.

We respectfully submit that Judge McArthur's position was correct to the extent of holding that the exception to the statute of 1860 is repugnant to the theory of a present grant. It is necessary, however, to give due effect to every clause of the statute. (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–6; *Rice* v. *Railroad Co.*, 1 Bl., 358, 378–9.) The grant, therefore, is to be construed, like that in the Heydenfeldt case, as not *in præsenti*, but *in futuro*.

This was doubtless the intent of its framers. Great embarrassment had arisen in the administration of the act of 1850, which had called for special legislation in

1855 and 1857. Swamp lands were granted to the States, not because Congress desired to be munificent, but because it recognized the inadvisability of carrying out a proper system of drainage within State limits by Federal agencies. The purpose of the grant, as recited in the statute of 1850, was "to enable the State * * * to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein."

The same object would be attained if preemptors should take possession of the land and drain it themselves.

It may be objected that the familiar form of railroad land grant contains an exception in favor of preemptors and other settlers, and yet is well settled to import a grant *in præsenti*, the railroad being compensated by indemnity lands for anything which it may lose in this way. There is a vital distinction, however, between the two cases. Under the present grant, as above pointed out, the date of identification is fixed by an officer of the grantor. Under the customary form of railroad land grant, it is fixed by the grantee by filing a plat in the General Land Office. There is another vital distinction in that the railroad land grants provide indemnity for lands lost to the grantee by preemption or otherwise. The United States thus says to the railroad: "We grant you so much land, and the time of its identification depends entirely upon you. If you have your plat ready, you may file it to-day. In order, however, that the settlement of the country shall not be delayed, all land which is settled upon before you file the plat is to be regarded as conveyed

back to us for the benefit of the settlers, and in consideration of other lands which we agree to grant you by way of indemnity."

If the date of identification of the lands were to be fixed by the grantor instead of the grantee, and if no indemnity were to be allowed for lands meanwhile granted to settlers, then we submit that the railroad land grants would have been construed as operating *in futuro* and not *in præsenti*. The unfairness of making the identification of the grant depend upon the action of the Interior Department is shown by Mr. Justice Field in *Van Wyck* v. *Knevals*, 106 U. S., 360, 367. There is no unfairness, however, in making a grant take effect at the option of the grantor, when it is not the agreed consideration for a special piece of work which the grantee undertakes to perform, but a mere method of securing proper care for the object granted.

(2) *Whether or not the grant is in præsenti, it remains a float, and no particular subdivision of land vests in the grantee, until title is transferred by some act of the Interior Department.*

If the grant is *in futuro*, as above argued, of course nothing vests until title to some definite piece of land is confirmed. If it is *in præsenti*, still, as a general rule, title does not pass to any particular piece of land until action by the Interior Department; although, when the title is thus transferred, it relates back to the time of the original grant and cuts off intervening rights. There are only two exceptions to this general rule: First, when the Secretary of the Interior unreasonably delays action,

in which case, at least for certain purposes, the State or its grantees may prove the character of the land orally, as in *Railroad Co.* v. *Smith*, 9 Wall., 95; and second, when the Secretary refuses to grant a patent, as in *Wright* v. *Roseberry*, 121 U. S., 488.

Substantially the same question was very fully discussed in *Barden* v. *Northern Pacific R. R.*, 154 U. S., 288. That case arose under a railroad land grant *in præsenti* which excepted mineral lands. The lands in controversy were not known to be mineral lands when they were granted, nor even when the grant ceased to be a float by the filing of the plat. They were discovered to be mineral before any patent issued. The court held that the identification was not final or complete until final decision by the Secretary of the questions of law and fact involved, and that they remained open until the issuance of the patent (pp. 326–331). A railroad grant takes effect at once as a float. Upon filing the plat, it attaches to all lands not swamp or mineral or preempted, &c. Whether swamp or mineral is ascertained when the patent issues. Whether preempted, &c., is open to contest in the courts.

There is, in fact, nothing very peculiar about the effect of these great land grants *in præsenti*. Ordinary patents to preemptors also relate back to the time when they became vested with an interest in the land (*Shepley* v. *Cowan*, 91 U. S., 330).

The decisions as to swamp land grants *in præsenti* are fully set forth in *McCormick* v. *Hayes*, 159 U. S., 332. The grant in effect is not of all swamp lands, but of all lands which may in the future be found by the Secretary of the Interior to have been swamp lands at the date of

the act; "and therefore the purchaser from the State takes subject to his determination of the question, which is final." (*McConnaughy* v. *Wiley*, 33 Fed. Rep., 449, 453.) In every large and swampy State, doubtless some swamp lands are actually never identified and transferred, while others which are not swampy in fact pass under the statute; for the Secretary, though supreme, is not infallible.

In the present case, for instance, serious questions have arisen as to whether the land was "swamp and overflowed" within the meaning of the statute at the time of its passage. The facts are disputed, some claiming that they were in the bed of the lake; and it is also disputed whether or not lands in the bed of a lake are to be regarded as "overflowed."

These questions are for the Secretary to decide. (*Heath* v. *Wallace*, 138 U. S., 573, 584–5; *Burfenning* v. *Chicago, &c., R. R. Co.*, 163 U. S., 321, 323.) It is not alleged in the bill that he is guilty of any unreasonable delay in deciding. If, therefore, he has not yet decided the question, appellant can not be heard to say that the lands are "swamp and overflowed." (*McCormick* v. *Hayes, supra.*)

Has he decided?

(3) *The title is transferred by a patent, not by a mere approval of a list or survey; and until the patent issues, the matter remains sub judice before the Secretary of the Interior.*

That questions of title remain open to reconsideration by the Secretary of the Interior until he has finally transferred title from the United States by signing letters patent or some equivalent instrument, is now well settled.

This court in *Knight* v. *United States Land Association*, 142 U. S., 161, 178, speaking by Mr. Justice Lamar, and adopting language of the Secretary of the Interior in the same case (5 L. D., 494), said:

> For example, if when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul.

These remarks are repeated in *Orchard* v. *Alexander*, 157 U. S., 372, 382. In *New Orleans* v. *Paine*, 147 U. S. 261, 266, Mr. Justice Brown said:

> Until the matter is closed by final action the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.

The same principle applies when a claim is raised of newly discovered evidence. Such rehearings are common in the Interior Department. One such case was recently brought to the attention of the court in *In re Emblen*, 161 U. S., 52. Each case remains open to reconsideration by the Secretary up to the time of issuing the patent, just as a case in court remains open to reconsideration at least until the judgment is signed.

Some statutes dispense with letters patent, and expressly provide that the issuance of a certificate, or the approval of a plat or survey, shall operate to transfer title from the United States, leaving the patent, if any is to issue at all, merely a further assurance. Statutes of this kind were construed in *Hedrick* v. *Hughes*, 15 Wall., 123; *Martin* v. *Marks*, 97 U. S., 345, 347; *Frasher* v. *O'Connor*, 115 U. S., 102; *Wright* v. *Roseberry*, 121 U. S., 488; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S., 165.

The statute of 1850, on the contrary, expressly provides for a patent. The Secretary is "to make out an accurate list and plats * * * and transmit the same to the governor * * * and at the request of the said governor, cause a patent to be issued to the State therefor." The grant is not made until the United States is officially informed by the governor of the State that it will be accepted. The patent, therefore, is the instrument which transfers the title.

This was the ruling in *Michigan Land & Lumber Co.* v. *Rust*, 31 U. S. App., 731, decided by the Circuit Court of Appeals for the Sixth Circuit. The case is now upon the docket of this court, but it was evidently very fully argued, and it is submitted that the opinion is conclusive. The contention of the plaintiff which was overruled by the court, thereby affirming the court below, was "that no matter how gross the error, or from what cause proceeding, the Secretary of the Interior, when once he had certified a list of lands as falling due to the State under the grant, was without power to rectify it, though no patent had been issued and the rights of no

third party had become involved by purchase from the State" (p. 746). The decision is in point here since, while the claimant represents purchasers from the State, it bought and paid for the land before either of the approvals upon which it bases its present claim, and thus is unable to claim any estoppel by reason of them. This opinion was based largely on the Knight case, as were those of Judge Cox and Mr. Justice Shepard in the case at bar (pp. 48–9, 57–9).

(4) *The lists were never in fact approved.*

The approvals are qualified by the phrase "subject to any valid adverse rights that may exist to any of the contracts therein described." Such rights might exist in preemptors as above shown. The Secretary leaves this question open for further determination, and his action, therefore, lacks the element of finality. It was, in effect, equivalent to the action of a judge in signing an interlocutory decree providing for an accounting, which does not cut off his right to grant a final decree on the merits in favor of the other party, even upon facts already in evidence when the interlocutory decree was made (*Kelley* v. *Stanbery*, 13 Ohio, 408, 422; *Barton* v. *Barton*, 3 Kay & J., 512, 517; *Baugh* v. *Baugh*, 4 Bibb, 556).

The approvals were revoked, as pointed out by Secretary Smith, in pursuance of the powers reserved by their own terms.

(5) *Even were the approvals unqualified, they would be premature, considered as transfers of title.*

The statute contemplates that the State should make a formal request through its governor before the title is transferred. This request is to be preceded by a transmission of the lists and plats of the land to the governor by the Secretary of the Interior. The approvals by Secretary Noble were approvals made for the purpose of authenticating the lists for transmission to the governor. One list was actually transmitted, the other not. No subsequent action was taken by the Secretary prior to the revocation of the approvals.

In closing this branch of the discussion, it should be pointed out that we have not considered it necessary to comment on the allegations at pp. 4–5 of the petition concerning alleged agreements between State officials and those of the Land Department. These alleged agreements as pleaded are conditional and tentative on their face, and they are not in any way legally binding upon the United States, or operative as a legal restraint upon the Secretary of the Interior. They clearly belong to a common class of so-called agreements which are often entered into by Government officials without warrant of the law or power to bind their successors or even themselves. They are practically but statements on behalf of the officials as to how they will rule upon questions which may come before them in the future. It is presumable that they will so rule, and even that their successors may consider themselves morally bound to take the same course if lawful; but the agreements have no more binding force than the opinions of the Comptrollers of the Treasury under the old system of accounting (20 Op., 655).

IV.

Assuming that the approvals of 1892 conveyed no title, appellant's claim is without merits.

It puts in an alternative claim to these lands on the theory that, having been part of the bed of a lake, they passed to the riparian owners. This claim is based upon *Hardin* v. *Jordan*, 140 U. S., 371. Appellant alleges that it is the owner of all the lands which formed the boundary of the former lake.

By mesne conveyances from the State of Oregon, it is alleged to have become vested in the title thereto in some manner not stated.

If this be true, and the Secretary of the Interior shall find the lands not to be "swamp and overflowed," but shall issue patents thereon to the dry land claimants, appellant will be able to sue the patentees under *Johnson* v. *Towsley*, 13 Wall., 32, and similar cases, among them the very case upon which it here relies.

The question of the character of the lands is still open to reconsideration, however, as to all the lands except those patented to the two persons mentioned in the bill. Upon further newly discovered evidence, the Secretary may finally hold that the lands were "swamp and overflowed" as claimed by this appellant; but he may hold, on the other hand, that they have been lawfully preempted between 1888 and 1892, and are therefore specifically excepted from the swamp land act. His jurisdiction can not be cut off by an injunction.

Nor would it be proper to sustain a bill upon this theory, when the claim of riparian ownership never appears

to have been presented to the Secretary of the Interior, but on the contrary is inconsistent with the claims which the appellant persistently urged before him and his predecessor in office; and especially when the bill is entirely devoid of information as to the date or manner of the alleged transfer of title from the United States to the State of Oregon. (*United States* v. *Atherton*, 102 U. S., 372; 1 Daniell Ch. Pl. & Pr., 367–9, *Marshall* v. *Turnbull*, 34 Fed. Rep., 827.) It appears affirmatively in the bill that some unnamed agents of the State of Oregon disavowed title in the State in 1888 by assuming to make a selection of these lands under the swamp land acts; and that as to one of the lists the governor asked for a transfer under that act without calling attention to any other rights. Under these circumstances the bill is too vague and inconsistent to be the foundation of the relief sought.

It is respectfully submitted that, if the appeal is not dismissed, the decree should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

HOLMES CONRAD,
Solicitor General.

165-28

DEC 15 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 550.

THE WARNER VALLEY STOCK COMPANY,
APPELLANT,

vs.

HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREAUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEES.

JOS. K. McCAMMON,
JOHN MULLAN,
JAMES H. HAYDEN,
Of Counsel.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1896.

Supreme Court of the United States.

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No. 550.

THE WARNER VALLEY STOCK COMPANY, APPELLANT,

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HOKE SMITH, SECRETARY OF THE INTERIOR, AND SILAS W. LAMOREAUX, COMMISSIONER OF THE GENERAL LAND OFFICE.

Appeal from the Court of Appeals of the District of Columbia.

Brief for Appellees.

This cause was heard in the Supreme Court of the District of Columbia upon the bill of complaint and exhibits and the demurrer thereto. It was brought before the Court of Appeals of the said District on appeal, taken by the plaintiff, from the decree entered in the Supreme Court of the District of Columbia sustaining the demurrer and dismissing the bill of complaint. The Court of Appeals affirms the decree of the Supreme Court of the District of Columbia.

Statement of the Case.

It is alleged in the bill of complaint that by the act of Congress, approved September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," it was provided:

> "That to enable the State of Arkansas to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State. (§ 1.)
>
> "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and at the request of said governor cause a patent to be issued to the State therefor, and on that patent the fee simple of said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof. . . ." (§ 2.)

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shortly after the passage of this act, issued a circular to the governors of the States interested, setting forth the methods by which the swamp lands could be located and selected. (Record, page 2.)

By the act of Congress of March 12, 1860 (12 Stat. 3), it was provided (*inter alia*) as follows:

> "That the provisions of the act of Congress, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September twenty-eighth, eighteen

> hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon, provided that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act."

The State of Oregon adopted that method of making a selection of swamp lands, prescribed by the Secretary, of the Interior, which permitted her to do so, through her own agents; and thereafter, presented proof tending to show that the lands selected were of the character contemplated by the acts of Congress. (Record, page 3.)

On January 17, 1887, the Secretary of the Interior directed that the public surveys be extended "throughout the length and breadth of what is termed Lake Warner (in the State of Oregon), or so much thereof as practicable, and thus throw open for disposal under the public land laws lands for which no claim of record can now be made" (5 L. D. 369). Whereupon the lands were surveyed by a U. S. deputy surveyor, and his survey was approved and accepted. In November and December, 1888, the approved plats of survey were filed in the proper land office.

On December 29, 1888, the U. S. surveyor-general for Oregon certified to the Commissioner of the General Land Office lists of certain lands, aggregating a large number of acres, included within the above-mentioned survey, they having been selected by the State of Oregon as swamp and overflowed lands (but not returned by the United States as swamp and overflowed), the title to which it was alleged (by the State of Oregon) had inured to the State under the provisions of the acts of Congress above cited. (Record, page 4.)

Subsequently, in March, 1892, the Commissioner of the

General Land Office submitted to John W. Noble, Secretary of the Interior, a list of lands embraced in said survey, containing 1,976.5 acres (which list is described as list No. 30 of swamp and overflowed lands, Lakeview district), recommending that it be approved. On April 9, 1892, the said list was approved by Secretary Noble, "subject to any valid adverse rights that may exist to the tracts of land therein described." (Record, pages 6 and 7.)

On April 28, 1892, the approval of this list was noted in the records and tract books of the General Land Office, and thereafter a certified copy of said list was forwarded to the governor of the State of Oregon, and by letter dated May 12, 1892, he requested that a patent for said lands should be issued to the State.

Another list of lands included in said survey, containing 2,764.31 acres, was prepared in the office of the Commissioner of the General Land Office (which list is known as List No. 31, Lakeview district). This list was approved by Secretary Noble on December 3, 1892, "subject to any valid adverse rights that may exist to any of the tracts therein described," and on December 20, 1892. This approval was noted on the tract books of the General Land Office. (Record, pages 7, 8, and 9.)

No patent has been issued to the State of Oregon for any land included in either of the said lists, 30 and 31, and no certified copy of this list (No. 31) was forwarded to the governor of the State of Oregon.

On March 2, 1893, Secretary Noble, for cause shown, ordered that both of the above lists be revoked and cancelled, whereupon the Commissioner made said revocation and cancellation effective by proper entries on the records and tract books, where the approval of the same had been noted. (Record, page 29.)

Subsequently, on December 19, 1893, the present Sec-

retary affirmed the order of revocation and cancellation made by his predecessor, stating (as appears from Exhibit C, annexed to the bill, Record, p. 28), that the action taken by Secretary Noble on March 2, 1893, was based "upon information furnished by the Land Office that adverse claims to tracts involved in said lists were then pending in that office and had not been disposed of, and that the character of said lands was contested by adverse claimants." (Record, pages 28–32.)

On October 10, 1894, Secretary Smith denied the motions for review and rehearing of his decision of December 19, 1893, and affirmed and sustained the same. (Record, page 33.)

It appears from the allegations of the bill that patents for certain lands included in one or the other of lists 30 and 31 had already been issued to private citizens under the land laws of the United States, and that other settlers have duly submitted proofs in support of their respective filings and entries made, under similar land laws of the United States. (Record, page 16.)

It will be seen that by the action of Secretary Noble of March 2, 1893, and by the decisions of Secretary Smith, above referred to, both of these officials have decided that the approval, by the former, of the lists in question was erroneous, and a result of a mistake of fact, procured by the State of Oregon; and, that the lands, included in lists 30 and 31, were not swamp and overflowed at the time of the approval of the act of March 12, 1860. (Record, pages 28–33.)

To this bill the defendants demurred, assigning as grounds thereof (*inter alia*) matters now to be considered.

Argument.

I.

It appears from the bill of complaint that the Supreme Court of the District of Columbia has no jurisdiction over the defendants, upon the facts and subject-matter of the suit. And in particular it appears that no title, legal or equitable, has vested or been confirmed in the State of Oregon or in the appellant, by patent of the United States, or otherwise, in a manner complying with the requirements of the acts of September 28, 1850 (9 Stat. L. 215), and March 12, 1860 (12 Stat. L. 3), and that prior to the vesting and confirmation of title in the State of Oregon, or in the appellant, as aforesaid, the sole jurisdiction over the facts and subject-matter, in the bill alleged and set forth, is, by the provisions of said acts of Congress, vested in the Secretary of the Interior.

A.

The jurisdiction of the Secretary of the Interior is paramount and exclusive in all questions and cases affecting the disposition of the public lands of the United States, where discretion is given him by statute to determine the law and the facts. Until title passes by the final act provided for by law, which is the recording of a patent, there remains in the Secretary the right to determine whether the United States should part with its title, and if so, to whom the land in question shall go.

U. S. *v.* Schurz, 102 U. S. 378.

Wright *v.* Roseberry, 121 U. S. 488.

Heath *v.* Wallace, 138 U. S. 573.

Williams *v.* U. S., 138 U. S. 515.

Knight *v.* U. S. Land Assn., 142 U. S. 161.

Re Emblem, opinions of the U. S. Supreme Court, No. 9, March 16, 1896, p. 484.

B.

The method of acquiring title to swamp and overflowed lands by the State of Oregon is provided for by the act of Congress approved September 28, 1850 (9 Stat. L. 215), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," and the act of Congress approved March 12, 1860 (12 Stat. L. 3), entitled "An act to extend the provisions of the 'Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits' to Minnesota and Oregon, and for other purposes." It is apparent that, although the grant of swamp lands to Oregon was one, *in præsenti*, the identification and location of such lands were left within the sole jurisdiction and determination of the Secretary of the Interior. Without detailing, at length, the machinery by which the Secretary reaches a conclusion as to the character of the land, it is sufficient to say that proofs were offered on the part of the State of Oregon, showing that the lands selected were swamp and overflowed, and, on the other hand, evidence is submitted, by agents of the Government, and, in many cases, by citizens seeking the land under the various land laws, showing that the lands, so sought, were not swamp within the meaning of the acts of Congress. In no case can the Secretary avoid the responsibility of deciding whether the lands applied for were within the description of the granting act, at the time of its approval.

The act of 1850, (sec. 2,) provides "that it shall be the duty of the Secretary of the Interior . . . to make out an accurate list and plats of the lands described as aforesaid—('swamp and overflowed lands made unfit for cultivation which shall remain unsold at the passage of the act')—and transmit the same to the governor of the State." In-

dependent of the other points which will be discussed, the first thing to be noticed is that the Secretary is required "to make out *an accurate* list and plats of the lands." In other words, before the matter passes from his jurisdiction, he must be satisfied that the list and plats are *accurate;* otherwise he will fail to do his duty. The word "accurate" presupposes a conclusion, a decision, which, so far as human judgment can ascertain the fact, must be correct, exact, and determinate. If the Secretary be ordered by the court to act upon lists which, in his best judgment, he considers not to be accurate, such a decree would seem to violate fundamental principles of law.

To make a minor point, attention is called to the Secretary's additional duty under the act of 1850, to "transmit the same (that is, *accurate* lists and plats) to the governor of the State." If it is supposable that the Supreme Court of the District of Columbia had any jurisdiction whatever in cases of this nature, it is suggested that it might have been exercised with much propriety against the Secretary of the Interior, if it had been made to appear to that court that he was about to transmit lists and plats to the governor of the State of Oregon which he (the Secretary) knew were not accurate.

Arguing the case on a broader plane, we submit that the Secretary's jurisdiction over the disposition of the public lands, including swamp lands, does not cease so long as there remains any period of time, before the issuing of the patent and the recording of the same, in which he can be made acquainted with any fact or principle of law which may aid him, in reaching what, in his judgment, is a proper and correct decision and determination. This is the scope of the authority of the Secretary which was recognized by Congress, in both the acts of September 28, 1850, and March 12, 1860; in the first by the use of

the words, "on that patent the fee simple of said lands shall vest," and in the second by the words, "provided that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act."

Speaking of the second section of the swamp-land act of September 28, 1850, the Supreme Court, in the case of *French* v. *Fyan* (93 U. S. 169), says:

> "It was under the power conferred by this section that the patent was issued under which the defendant holds the land. We are of opinion that this section devolved upon the Secretary, as the head of the Department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.
>
> "We have so often commented in this court on the conclusive nature and effect of such a decision when made and evidenced by the issuance of a patent" . . . The court then quotes from Johnson *v.* Towsley (13 Wall. 72), to the effect that the decisions of special tribunals on matters referred to them by law must be upheld.

Attorney-General Miller (19 Op. A. G. 684), in discussing what the law is on this particular point, after quoting from the case just cited, makes use of the expression that the Secretary of the Interior is the *tribunal* to decide what lands are swamp.

In the case of *Wright* v. *Roseberry* (121 U. S. 481) the court makes use of the following language:

> "The determination of the Secretary upon these matters (that is, as to the character of the land), as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided." (P. 500.)
>
> . . . . . .
>
> "The result of these decisions is, that the grant of 1860 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible where the Secretary declares his inability to certify the lands to the State for any other cause than a consideration of their character." (P. 509.)

Until the final act of the Secretary has been performed, it is within his power to cancel any lists on the ground that they are not accurate, as contemplated by the act of 1850. It appears that Secretary Noble approved the lists in controversy, *subject to any valid adverse rights that might exist to the lands therein described*, and (quoting the language of Secretary Smith, in his decision of December 19, 1893, in connection with these lists):

> "Subsequently, however, upon information furnished by the Land Office that adverse claims to the tracts involved in said lists were then pending in that office and had not been disposed of, and that the character of said lands was contested by adverse

> claimants, the Secretary (Noble) directed that the Commissioner retransmit to the Department all the papers in the case; thereupon the Secretary revoked and cancelled his approval of said swamp-land lists 30 and 31, and directed the Commissioner to make such revocation and cancellation formal and effective, and to make full report to the Department in relation to all of the matters set forth in the petition of the several claimants."

Bearing in mind that the Secretary of the Interior was the tribunal, which was to determine the character of the lands in question, it was within his authority to review his former decision, that these lands were swamp and overflowed, within the meaning of the acts of 1850 and 1860; and it appearing to him, from new evidence, that the lands were *not* swamp and overflowed, it was within his authority to determine, as he has, that his former decision was erroneous and to render one that was correct. Such a review is similar to the action of a court in granting a new trial on the ground of newly discovered evidence.

This question has been ably presented by Secretary Vilas in his decision of December 17, 1888, in the matter of the adjustment of the swamp-land grant to the State of Michigan (7 L. D. 514, 523). His conclusion was that the right of the Secretary to change, revoke, or cancel a certification, where the original, in his opinion, was issued by fraud, mistake, or accident, and that the reason for this right seems, indisputably, to demonstrate that a right of correction, in a proper case, remains in the Secretary, even after a certification has been made; but prior to the issuance of patent.

This doctrine was followed by the Supreme Court of the United States in the case of *Knight* v. *U. S. Land Ass'n* (142 U. S. 161), where the court said:

> "For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annullment, and it will hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney-General to take measures to annul."

The contention that the Secretary of the Interior had the right to interfere before patent is not weakened by the ruling in the case of *Wright* v. *Roseberry* (121 U. S. 488). There it was held, that swamp lands in California passed by the operation of the first section of the act of 1850, and not by that of the second section. This is only true, as the opinion indicates, when the Secretary has refused to act or identify the lands in controversy or when no question has ever arisen to throw doubt upon their swampy character.

With regard to the case last cited, the court, in *McCormick* v. *Hayes*, (159 U. S. 332) says:

> "So far from modifying the rule announced in *French* v. *Fyan*, the court recognized the authority of that case, and distinguished it from the one then under consideration."
>
> See, also, *Chandler* v. *Calumet & H. Min. Co.*, 149 U. S. 79.

In the case of *Noble* v. *Union River Logging R.R. Co.* (147 U. S. 165) it was held; that a decision of the Secretary of the Interior, in the exercise of powers conferred upon him by the act of March 3, 1875, and in which he

determined that a railroad company is entitled to a right of way over public lands; is final and cannot be revoked by his successor in office. The court held further that, whether a railroad company applying for such grant is a company which the statute authorizes to receive a right of way, is a quasi-judicial question, which, once determined by the Secretary, is final, so far as the executive is concerned. The court finds that Secretary Vilas, on being satisfied that the railroad company as authorized, by its articles of incorporation, was such an one as the act of Congress contemplated, and that, when all the other requirements of the act had been observed, the Secretary was authorized to approve the profile of the road, and to cause such approval to be noted on the plat books of the land office of the district where the land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands. The court, in view of the special provisions of the act of March 3, 1875, which made it the final act; precedent to the establishment of the railroad's right of way, treated the approval of the map of right of way by the Secretary, and the recording of the same upon the plat books, as equivalent to the recording of a patent, in ordinary cases.

The learned justices, who delivered the opinions of the Supreme Court of the District of Columbia and the Court of Appeals in the case at bar, point out the essential points of difference between the case at bar and the Union River Logging Company's case, in a manner so clear and convincing, as to leave no doubt on the subject.

Mr. Justice Shepard said:

> "We agree with the learned justice (Mr. Justice Cox) who heard the cause, that the case here differs

from Noble *vs.* Union River Logging Co., 147 U. S. 165, upon which the appellant strongly relies. 'That case,' he correctly said, 'arose under a law granting to railroad companies the right of way over public lands. It contained a provision that a railroad company seeking to have the benefit of the act shall file with the register of the land office for the district where the land is located, a profile of its route, and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all lands over which said right of way shall pass shall be disposed of subject to said right of way. *The final act here was noting the profile which had been approved by the Secretary of the Interior upon the plats in the land office, and from that moment the right of way was established.*' No patent was required by the statute in that case, to convey the easement. The right thereto vested upon approval of the profile and the delineation of the right of way upon the plats; and was, therefore, held beyond recall by a succeeding Secretary. In this case, the noting of the lists of 'swamp and overflowed' lands upon the tract books of the department was not required or provided for by the acts of Congress; *but the issue of the patent was expressly provided for as the last act* in the series essential to the complete vesting of title."

It will be noticed that, neither in this case nor in any other, has the court gone so far as to intimate that the Secretary has not full power and authority to revoke and cancel his own official act, such as that of Secretary Vilas in approving the right of way of the Union River Logging Co.

D.

An injunction will not lie against an act not purely ministerial. In other words, it is a complete defence, to

an application for an injunction, that the performance of the duty in question involves the exercise of discretion, either in the construction of an ambiguous law (*Brashear* v. *Mason*, 47 U. S., 6 How. 92, 102; *Reeside* v. *Walker*, 52 U. S., 11 How. 272, 289; *United States* v. *Guthrie*, 58 U. S., 17 How. 284, 304; *Gaines* v. *Thompson*, 74 U. S., 7 Wall. 347; *United States* v. *Lamar*, 116 U. S. 280, 286;) or the decision of an issue of fact upon an examination of parol evidence or affidavits. (*United States* v. *Seaman*, 58 U. S., 17 How. 225; *United States* v. *Edwards*, 72 U. S., 5 Wall. 563; *Cox* v. *United States*, 76 U. S., 9 Wall. 298.)

Then, again, executive discretion can be neither directed nor controlled.

United States v. *Windom*, 137 U. S. 636.
United States v. *Blaine*, 139 U. S. 306.

In the case of *Belknap et al.* v. *Schild* (161 U. S. 10), it was sought to regulate the control and use of property belonging to the United States, by means of an injunction issued against its officers and agents charged with the control of that property, in respect to which property, those officers and agents acted pursuant to the authority delegated to them and without claim of title, or property, or possibility of benefit on their own behalf. The court said that no injunction can be issued against officers of the Government to restrain or control the use of property already in the possession of the Government, or money in its treasury when suit is commenced; or to compel the Government to perform its obligations; or where the Government has otherwise such an interest, in the object of the suit, as to be a necessary party.

The above case, we submit, is directly in point.

The true object of the case at bar, is to obtain from the United States, through judicial control of the executive

acts of its agents, lands held and owned by the United States.

The Secretary of the Interior and the Commissioner of the General Land Office make no claim to any personal right to the use or control of the lands, which are part of the public domain, but are simply proceeding, as they are in duty bound, to ascertain the proper disposition to be made of the lands, in controversy.

II.

It does not appear from the bill of complaint herein that the plaintiff has such title or interest in or to the lands described therein as to enable it to maintain suit against the defendants.

Under the acts of September 28, 1850, and March 12, 1860, which operated as grants *in præsenti*, the State of Oregon, on the latter date, became entitled to such lands within its boundaries as were contemplated, and intended to be granted, by those acts; yet the subject-matter of the grant was indeterminate, and it remained for the Secretary of the Interior to ascertain, accurately identify, and determine, pursuant to the provisions of those acts, exactly, specifically, and accurately, what lands fell within the description of the acts as those intended to be conveyed. Until the Secretary of the Interior should ascertain, accurately identify, and determine what lands passed, it could neither be maintained that the title to the lands had been confirmed in the State of Oregon, nor that the State had the immediate right to the possession of any particular section or sections. Until its title was so confirmed, and it was so entitled to the immediate possession of the land granted, the right of the State, under the acts of Congress, was

merely the right to require the Secretary of the Interior to perform such acts as were necessary to ascertain what lands were conveyed, and *thereafter* to secure the confirmation of title to such lands, in the manner indicated by the opinion of the court in the case of Wright *v.* Roseberry (*supra*). It appears, from the allegations of the bill, that the title to the lands in question has never been confirmed or vested in the State of Oregon, and that the State of Oregon is not and never has had the lawful possession of them. Therefore the Warner Valley Stock Company, which, it is alleged, is the grantee or assignee of the State of Oregon, by a series of mesne conveyances, has not such a title to the lands in question as to give it a right to maintain this suit, in its own name.

1 *Am. & Eng. Enc. L.* 833, *note* 1.
Marshall v. *Means*, 12 Ga. 61 (1852).

In the case of *Knight* v. *U. S. Land Assn.* (142 U. S. 161), which grew out of complicated claims to lands, it was held (Lamar, J.):

> "Ever since the decision in *Polk's Lessee* v. *Wendall* (9 Cranch, 87), it has been the settled law of this court that a patent is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so, and that the want of such title or authority can be shown in an action at law."

Therefore, the title of the State of Oregon to the lands, in question, being still unsettled and unconfirmed, assignments or grants from that State affecting the title to these lands must be treated as void, and the assignee or grantee of the State cannot ask, in its own name and right, to have certain lands designated as swamp and overflowed, nor ask that the title thereto be confirmed in him.

Attention is also called to that provision in section 4 of the act of Congress of February 15, 1859, admitting Oregon into the Union (11 U. S. Stat., 384), in words as follows, to wit: "that said State shall never interfere with the primary disposal of the soil within the same by the United States;" and it is respectfully submitted that the attempt of the State of Oregon to sell any of the lands described in said lists, prior to the issuance of a patent thereof, to her, from the United States, is an interference with the primary disposal of the soil by the United States.

III.

The State of Oregon, A. Cameron, and G. F. Maupin, in the bill of complaint named, and other persons referred to, but not named therein, are, by the plaintiff's own showing, proper and necessary parties to any suit which may be brought against the defendants in this court, touching any of the matters charged in the bill.

It appears from the eleventh paragraph of the bill that certain of the lands here claimed by the Warner Valley Stock Company, by virtue of mesne conveyances from the State of Oregon, have been patented, by the United States, to A. Cameron and G. F. Maupin. Furthermore, it is alleged in the bill that the defendants have permitted other settlers to submit final proofs in support of their respective filings and entries.

These patentees holding patents from the United States, which cannot be made the subject of collateral attack, have rights in the premises, which make them necessary parties to this suit. Until they are made parties, this suit cannot proceed, without a wholly illegal, inequitable and grossly unjust disregard of their rights.

The defendants, by reason of the indefinite and uncertain allegations of the bill, are unable to state, in their demurrer, the names of the settlers to whom the bill refers, but it is submitted that, if filings and entries have been made in the proper U. S. local land offices in Oregon upon the lands in question, the title to such lands, not having been confirmed or vested in accordance with the provisions of the acts of 1850 and 1860, in the State of Oregon, such settlers have rights which cannot be disregarded. They are entitled to be heard, and for that purpose, to be made parties to this suit.

Again, as we have noted in the argument upon the second ground of demurrer, the Warner Valley Stock Company is, in its own name, entitled to no standing in court, and if, on the facts alleged by the bill, any person, individual, or State is entitled to the relief prayed, it should be asked in the name of the State of Oregon, which is a necessary and indispensable party.

IV.

The truth of the facts alleged by the plaintiff in its bill of complaint has not been verified in accordance with law.

The verification of the bill is as follows:

"DISTRICT OF COLUMBIA, *ss:*

"I, George M. Kober, being first duly sworn, depose and say that I am director of the Warner Valley *Cattle* Company (a corporation); that I have read the foregoing bill of complaint and know well the contents thereof, and the statements of facts in said bill of complaint contained are true.

"GEORGE M. KOBER.

"Subscribed and sworn to before me this 13th day of January, A. D. 1896.

"R. H. EVANS, [SEAL.]

"*Notary Public, D. C.*"

A rule of the Supreme Court of the District of Columbia (Equity Rule 90), provides; that "Every verification of a bill, answer, or petition shall be to the following effect:

> "'I do solemnly swear that I have read the [bill, answer, petition] *by me subscribed*, and know the contents thereof, and that the facts therein stated upon my *personal* knowledge are true, and those stated upon information and belief I believe to be true.'"

The bill, in this case, was *not* subscribed by George M. Kober, (see Record, p. 18); nor does it appear from the verification that he was an officer of or had any connection with the Warner Valley *Stock* Company, which did subscribe the bill by Charles A. Cogswell, its president.

It cannot be presumed, that because George M. Kober, the affiant, is a director of the Warner Valley *Cattle* Company, that he has any *personal* knowledge of the affairs of the Warner Valley *Stock* Company, the plaintiff, named in the bill, or any *personal* knowledge of the contents of the bill. It should be noted that Kober does not claim to have any such knowledge, and does not state the source of the knowledge that he may have.

We submit that the verification is defective and that the relief asked cannot be granted, for that reason.

Equity Rule 90, Supreme Court of the D. C.
Alexander's Chancery Practice, p. 80.
Bank of Orleans *v.* Skinner, 9 Page (N. Y.), 304.
Mackey's Practice & Procedure, p. 411.

Wherefore the appellees pray that the decree of the court below be affirmed.

JOS. K. McCAMMON,
JOHN MULLAN,
JAMES H. HAYDEN,
of Counsel.